SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 39

AERO MAYFLOWER TRANSIT COMPANY,

Appellant,

vs.

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, ET AL.,

Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF OF APPELLANT

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SUPREME COURT OF THE UNITED STATES

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No. 39

AERO MAYFLOWER TRANSIT COMPANY,
Defendant and Appellant,

vs.

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, ET AL.,
Plaintiffs and Appellees

BRIEF OF APPELLANT

Opinion Delivered by the Court Below

The opinion delivered by the Supreme Court of Montana, (written by Mr. Justice Morris and concurred in by Chief Justice Lindquist and Justices Adair and Angstman) dated June 29, 1946, is reported as *Board of Railroad Commissioners* v. *Aero Mayflower Transit Co.* in 172 Pacific (2nd) 452, and is set forth at pages 103-119 of the Transcript of Record on this appeal. This opinion does not appear in any extant volume of the Montana Reports. The last printed volume of such Reports (116) contains no reference to cases decided after February 10th, 1945.

The reserved and dissenting opinion of Mr. Justice Cheadle of the Supreme Court of Montana, filed September 19th, 1946, is found subjoined to the principal opinion in 172 Pacific (2nd) at page 462, and is set forth at pages 119-123 of the Transcript of Record on this appeal.

Jurisdiction

A complete Statement as to Jurisdiction has heretofore been printed and filed, and this Court, on March 10th, 1947, noted probable jurisdiction (R. 161).

Jurisdiction of this appeal is based upon Section 237(a) of the Judicial Code of the United States, cited as Section 344(a), Title 28, United States Code, annotated.

Briefly, this appeal is prosecuted from a final judgment and decree of the Supreme Court of the State of Montana which restrains and enjoins the appellant (defendant below) Aero Mayflower Transit Company, a motor carrier of household goods and office furniture, moving only in interstate commerce, from operating in interstate commerce over the public highways of the State of Montana, until the carrier pays to the Board of Railroad Commissioners of the State of Montana, for the years 1937, 1938 and 1939, two (2) different kinds of taxes imposed upon its interstate operations by virtue of two (2) different statutes enacted by the legislative assembly of the State of Montana at different times, viz.,

(1) a "flat" or "straight" $10.00 per annum tax on each vehicle operated by the carrier over the public highways of the State of Montana, imposed by Sections 3847.16, 3847.17 and 3847.18, Revised Codes of Montana, 1935 (Volume 2 of Codes, pp. 688 and 689), originally enacted as Sections 16, 17 and 18 of Chapter 184, Laws of Montana, 1931; and, also,

(2) a quarterly tax of one-half of one percent (½ of 1%) of the gross operating revenue of the carrier,

imposed by Sections 3847.27 and 3847.28, Revised Codes of Montana, 1935 (Volume 2 of Codes, pp. 691 and 692), originally enacted as sections 2 and 3 of Chapter 100, Laws of Montana, 1935;

each of said taxes being laid, in the words of such statutes, "in addition to all of the licenses, fees or taxes imposed upon motor vehicles in this state." The statutes are found in the Appendix to this Brief, at pages 93 through 100 of such Appendix, and the quotation just stated from the text of each at pages 93-95 for the "flat" vehicle tax and at pages 96-100 for the gross revenue tax. Both the "flat" per vehicle tax and the gross revenue tax were challenged by the carrier (a) before the Board of Railroad Commissioners of Montana which was the administrative agency charged with administering the vehicle tax, and, purportedly, the gross revenue tax (R. 36-45, (b) before the District Court of Silver Bow County, Montana, in which Court the Board sought an injunction restraining the carrier from operating in interstate commerce over the highways of Montana until it paid both taxes (R. 6-46, in particular, Sections G-M of Aero's Answer in the District Court, the Court of first instance, R. 21-34; R. 73-95), (c) before the Supreme Court of Montana (Opinion, R. 106, 107, 113; Petition for Rehearing, R. 124-139) and in this Court (R. 146-151) on multiple grounds reiterated in the Assignment of Errors in this Court (*id.*) *i. e.*, that each of the taxes as applied to appellant's interstate operations violate Sec. 8 of Article I, the Commerce Clause of the Constitution of the United States, the due process clause of Sec. 1 of Amendment 14, and the equal protection of the laws clause of Sec. 1 of Amendment 14 of the Constitution of the United States, thus repeatedly raising the Federal questions. Both taxes were also challenged on the ground that each statute violated the due process clause of Sec. 27 of Article III of

the Constitution of Montana, if construed to be applicable to the interstate operations of the carrier which undertakes no operations in intrastate commerce (Pars. H-K of Aero's Answer at R. 23-32).

These multiple and repeated challenges to each, the vehicle tax and the gross revenue tax, were disposed of below as follows:

The Board of Railroad Commissioners of Montana, after a hearing, by its administrative order of October 9, 1939, assumed to cancel a "permit" theretofore issued to appellant to operate in interstate commerce because of the nonpayment of the taxes and fees in question for the years 1937, 1938 and 1939 (R. 45-46).

On October 13, 1939, the Board followed its administrative action by filing in the District Court of the Second Judicial District of the State of Montana, in and for Silver Bow County, at Butte, a suit in equity, to restrain appellant from operating in interstate commerce, until it paid the taxes and fees for which the Board made claim (R. 1-4). Appellant, as defendant in the suit, defended on the merits (R. 5-95) and after trial, the District Court of Silver Bow County by Findings of Fact and Conclusions of Law (R. 95-97) and Amended Final Judgment (R. 97-98),

(a) *upheld* the validity of the "flat" or "straight" per vehicle tax imposed by sections 3847.16, 3847.17 and 3847.18, Revised Codes of Montana, 1935, and restrained appellant from operating in interstate commerce until such taxes were paid for the years 1937, 1938 and 1939 (R. 95-97; 97-98), but, on the other hand,

(b) *denounced* the gross revenue tax as imposed by sections 3847.27 and 3847.28, Revised Codes Montana, 1935, as invalid, and enjoined the Board from enforcing or applying such taxes against appellant (R. 95-97; 97-98).

Aero (appellant here) appealed to the Supreme Court of Montana from that part of the District Court judgment adverse to it, *i. e.*, upholding the validity of the "flat" or "straight" $10.00 per vehicle tax (R. 99-100). The Board appealed to the Supreme Court of Montana from that part of the District Court judgment adverse to it, *i. e.*, holding the gross revenue tax unconstitutional and void (R. 99). Each appellant specified errors in the rulings of the lower court adverse to it (R. 100-102).

The Supreme Court of Montana found that the gross revenue tax was valid, and, accordingly, *reversed* the judgment of the District Court of Silver Bow County as to that tax; the Supreme Court *affirmed* the trial court's conclusion that the "flat" or "straight" per vehicle tax was valid (R. 123). Thus, the applicability and the constitutionality of both taxes to appellant's interstate operations was affirmed by the highest court of the State of Montana (Opinion, 103-119) four of the five Justices of that Court concurring (R. 119) and one Justice dissenting from the conclusions of the majority as to both taxes (R. 119-123).

Upon remand to the District Court, judgment on remittitur was filed by that Court on October 28th, 1946 (R. 140-141), restraining appellant from operating its motor vehicles over and upon the public highways of the State of Montana until it paid to the Board both the vehicle tax and the gross revenue tax, in stated sums for each the years 1937, 1938 and 1939. This judgment was superseded by a judgment of the District Court filed January 3, 1947, incorporating the terms of its judgment of October 28, 1946, and adding the further restraint, in the presence of the stay bond filed in the District Court, enjoining appellant from operating over the highways of Montana until both kinds of taxes for the year 1940 "and each subsequent year" be paid to the Board (R. 154-156).

Supersedeas bond on appeal in the penal sum of $20,000.00 was approved by the Supreme Court of Montana when appeal was taken to the Supreme Court of the United States on December 16th, 1946 (R. 153), and on the same day the Supreme Court of Montana stayed all proceedings on its final judgment, "until the final determination of said appeal on mandate from the Supreme Court of the United States to the Supreme Court of Montana" (R. 152).

Statement of the Case

On October 3, 1935, the Board of Railroad Commissioners of the State of Montana (hereinafter referred to as "the Board") assuming to act under the provisions of Chapter 184, Laws of Montana, 1931, an act entitled: "An Act Providing for the Supervision, Regulation and Control of the Use of the Public Highways of the State of Montana by Motor Carriers Engaged in the Transportation by Motor Vehicles of Persons and Property for Hire Upon the Public Highways of the State of Montana; Conferring Certain Jurisdiction Over Such Transportation, Motor Vehicles and Their Operations, Upon the Board of Railroad Commissioners; Providing for the Enforcement of this Act and the Punishment for Violation Thereof; and Repealing Chapter 154, Laws Eighteenth Legislative Assembly, 1923, as Amended by Chapter 103, Laws Nineteenth Legislative Assembly, 1925, and as Amended by Chapter 141, Laws Twenty-first Legislative Assembly, 1929," (Laws of the Twenty-second Legislative Assembly of the State of Montana, 1931; at page 491, (subsequently and now codified as Chapter 310 of the Political Code, Volume 2, Revised Codes of Montana, 1935, Page 679, containing Sections 3847.1 through 3847.25, R.C.M. 1935) issued to Aero Mayflower Transit Company, a corporation, appellant, (hereinafter abbreviated to "Aero"), a so-called "permit" numbered

1854, authorizing it to transport property as a common carrier by motor vehicle *in interstate commerce* over the public highways of Montana. (R. 11, commencing at Paragraph C of Answer of Aero to complaint of Board; R. 37, commencing at Paragraph 1 of Exhibit "B" to said Answer; and R. 49, being admission of Board to Paragraph C of said Answer.)

Such "permit," as distinguished from a certificate of public convenience and necessity, was issued by the Montana Board under Section 3847.23, R.C.M. 1935 (originally Section 23 of Chapter 184, Laws 1931) then and now reading as follows:

> "*Application of act to interstate carriers and motor carriers operating in national parks.* The terms and provisions of this act shall apply to commerce with foreign nations, and to commerce among the several states of this Union, insofar as such application may be permitted under the provisions of the constitution of the United States, treaties made thereunder and the acts of Congress; provided that it shall not be necessary for an interstate or international motor carrier, in order to obtain a permit as herein provided, to make any showing of public convenience and necessity, except as to the transportation of passengers and/or freight between points within this state, the power to regulate such operation being specifically reserved herein; and provided further, the board is hereby authorized to exercise any additional power that may from time to time be conferred upon the state by any act of Congress, and provided further, that any motor carrier operating in and about any national park, whose rates and methods of accounting are controlled by contract with the United States, shall not be subject to any regulation by the commission in conflict with such contract or in conflict with any regulation by the United States made pursuant to such contract or made pursuant to an act of Congress of the United States."

At that time Aero was operating and at all times since the effective date of the Federal Motor Carrier Act, approved August 9, 1935 (Title 49, U. S. C. A., Sec. 301, now cited as Part II of the Interstate Commerce Act, February 4, 1887, c. 104, Part II, Sec. 201, as added Aug. 9, 1935, c. 498, 49 Stat. 543) had operated, under Permit No. 2934, issued to it by the Interstate Commerce Commission pursuant to the Federal Motor Carrier Act (R. 8, 37 at Par. 1, admitted by Board, R. 49).

Aero, which had operated its vehicles in interstate commerce over the public highways of Montana since 1935, declined in 1937 and thereafter to pay the vehicle tax and the gross revenue tax. On September 9, 1939, the Board issued an order to show cause why the permit should not be canceled, alleging that the Aero refused to pay the taxes referred to (R. 35-36). Aero made comprehensive answer and return to the Board's order to show cause. In its return, Aero attacked the two taxes as (a) not applicable in statutory terms or intent to its interstate operations, and if found to be applicable, as (b) unconstitutional and void on the same grounds as now asserted (R. 36-45).

After hearing, the Board on October 9th, 1939, revoked the interstate "permit" numbered 1354 which it had issued to Aero on October 3, 1935 (R. 45-46).

On October 13th, 1939, the Board commenced an action in the District Court of Silver Bow County at Butte, Montana, to enjoin Aero from operating motor vehicles upon any public highways in the State of Montana, upon the ground that Aero did not possess "*a franchise, permit or certificate of public convenience and necessity authorizing it to transport property by motor vehicles over or on the* public highways of the State of Montana" (R. 2).

Aero answered by denials, affirmative defense and cross-complaint, setting forth,—

its use of the Montana highways to the extent of the number of vehicles, number of trips per vehicle, empty mileage, loaded mileage and number of days or parts of days traveled by its equipment in Montana, for each — the years 1937, 1938 and 1939. (Par. D of Aero's Answer, R. 13-15);

its payment of (1) Registration and License Plate taxes to the State of Montana for its motor vehicles traveling in Montana, increasing from $660.50 in 1937 to $1212.52 in 1938, and in 1939 to $1630.50 (Par. E, R. 15 and 16), (2) its payment of the 5¢ per gallon tax on gasoline purchased for its motor vehicles in Montana, increasing from $745.30 in 1937 to $1257.90 in 1938, and to $1649.98 in 1939; (Par. E, R. 16 and 17);

and alleged,—

> "The total miles traveled by carrier's motor vehicles in interstate commerce in Montana in 1937 and 1938 and for the first ten (10) months of 1939 did not equal the average mileage per year per truck throughout the United States of America for carrier's operations. The total number of days all trucks of carrier were in the State of Montana, traveling loaded or unloaded, averaged a little in excess of one truck per each day of these years; and the empty mileage traveled in the State of Montana in 1937 was 37%, in 1938 was over 42%, and for the first ten months of 1939, 40% of total mileage traveled in Montana against like percentage for the United States of 25%."

(R. 6-35, and Exhibits attached to Answer at R. 35-46.) The Board filed reply and answer to the cross-complaint, consisting of admissions and denials (R. 49-53). The Board admitted by its answer (R. 49) the allegations contained in Sections A, B and C of the Further and Affirmative Defense and Cross-Complaint of Aero. The allegations in the

Sections admitted by the Board are material and in text are as follows:

A

"The carrier is, and has been since September, 1928, a corporation organized and existing under and pursuant to the laws of the State of Kentucky, with its principal office in the City of Indianapolis, State of Indiana; that it owns and operates a fleet of motor trucks, inclusive of the trucks occasionally within the State of Montana as hereinafter referred to, all of which are licensed under the laws of the State of Indiana, and carry at all times license plates of the State of Indiana; that its business is that of transporting by motor vehicle, in interstate commerce only, over the highways of the United States used household goods and office furniture, incident only to the change of residence of the owner of such goods, under a separate order for such transportation and given in each instance by or on behalf of the owner of said goods, at the rate for such transportation set out in its schedule of rates on file with the Interstate Commerce Commission of the United States. That each shipment is transported under a separate contract therefor, and may be from any point in the United States to any other point in the United States, so long as the point of destination is in a state other than the state within which the shipment originates. That the carrier does not operate its motor trucks, or any of them, on any fixed schedule, or over any regular routes. Shipments of furniture from without the state are transported to and delivered to points within the state, or shipments of furniture originating within the state are transported to points without the state, or shipments of furniture in transit are transported through the state, or motor trucks without load are driven through the state. That carrier never has done and does not now do or carry on and has no intention of carrying on hereafter any intrastate business in the State of Montana and that its operations with respect to the State of Montana have at all times been interstate operations into, out of, across or through said

State. That it has been granted, and now operates under, Permit No. 2934 issued to it by said Interstate Commerce Commission, under and pursuant to the provisions of the Federal Motor Carrier Act of 1935, as a common carrier." (R. 7-8)

B

"That the plaintiff Board of Railroad Commissioners of the State of Montana is an administrative tribunal of the State of Montana, created by an act (Chapter 37, Laws of Montana, 1907, now as amended, Sections 3779-3817 Revised Codes of Montana, 1935) of the Legislative Assembly of Montana, with power to sue in the name of the State of Montana and to be sued in the courts of the United States and of the State of Montana.

"The plaintiffs Paul T. Smith, Horace F. Casey and Austin B. Middleton, are the duly and regularly elected, qualified and acting members of and constitute the said Board of Railroad Commissioners of Montana, established by the act aforesaid.

"The said Board has by the terms of said original act (Sec. 16, Ch. 37, Laws 1907, now Sec. 3797 Revised Codes of Montana, 1935), general supervision of all railroads, express companies, car companies, engaged in the transportation of passengers or property in intrastate commerce within the State of Montana, inclusive of regulation of the intrastate rates and services of such carriers.

"The said Board was by an act (Ch. 52, Laws of Montana, 1913, now as amended; Sections 3879-3913, Revised Codes of Montana, 1935) of the Legislative Assembly of Montana, made ex-officio, the Public Service Commission of the State of Montana, and invested with the power to supervise and regulate the operations of persons, firms, associations or corporations, private or municipal, producing, delivering or furnishing for or to the persons; heat, street-railway service, light, power in any form or by any agency, water for business, manufacturing, household use, or sewerage serv-

ice, telegraph or telephone service, to the exclusion of the jurisdiction, regulation and control of such utilities by any municipality, town or village.

"The said Board was by an act (Chapter 63 Laws of Montana, 1913 now as amended, Sections 3859-3878 Revised Codes of Montana, 1935) of the Legislation Assembly of Montana further invested with powers to inspect, regulate and supervise steam vessels, other boats propelled by machinery, sailing craft, ferry boats and barges on the navigable waters of the State of Montana, and house boats, captains and pilots engaged in the carrying of passengers and freight on said waters, and enforce safety regulations applicable to such boats, captains and pilots.

"The said Public Service Commission was by an act of the Legislative Assembly of Montana (Ch. 109, Laws 1927, now as amended, Sections 3913.1-3913.24, Revised Codes of Montana, 1935, invested with power to license all persons, firms and corporations in Montana, engaged in the business of refining, manufacturing, or keeping for sale any gasoline, kerosene, distillate, road oil, fuel oil, lubricating oils and greases, inspecting such products, testing the same and enforcing standards of quality and strength with respect thereto.

"The said Board was by an act of the Legislative Assembly of Montana (Ch. 223, Laws of Montana, 1919, now as amended, Sections 3914-3946 Revised Codes of Montana, 1935) made ex-officio, the Montana Trade Commission, with power to fix rules, charges, rates, tolls and maximum profits of public mills as defined in said act, i.e., elevators, mills, factories, milling, manufacturing or producing flour bran, millfeed, or products or commodities of any kind, from wheat, oats, or other grain.

"The said Montana Trade Commission was by an act of the Legislative Assembly of Montana (Ch. 80, Laws of Montana, 1937, not integrated in the Revised Codes of Montana, 1935) made administrator of the 'Unfair Practices Act' of the State of Montana, with power thereunder to prevent unfair competition and discrimination, or sales below cost, among sellers of

merchandise in the State of Montana, in violation of principles, practices and standards prescribed by said act.

"The said Board was by an act of the Legislative Assembly of Montana (Ch. 8, Laws of Montana, Extra Session 1921, now Sections 3848-3858 Revised Codes of Montana, 1935) invested with power to regulate and supervise the operations, services, rates and charges of all persons, firms and corporations owning or operating any pipe line within the State of Montana, for the transportation of crude petroleum to or for the public for hire, or engaged in the business of transporting crude petroleum.

"The said Board was by an act of the Legislative Assembly of Montana (Ch. 184, Laws of Montana, 1931, now as amended; Sections 3847.1-3847.28, Revised Codes of Montana, 1935) vested with power and authority to supervise and regulate every motor carrier in the State of Montana, as in said act defined, viz.,

"'The term "motor carrier," when used in this act means every person or corporation, their lessees, trustees, or receivers appointed by any court whatsoever, operating motor vehicles upon any public highway in the state of Montana, for the transportation of persons and/or property for hire, on a commercial basis either as a common carrier or under private contract, agreement, charter, or undertaking; provided that nothing in this act shall be construed as affecting the operation of school busses which are used in conveying school children to and from district or other schools, or to the transportation of freight or passengers by motor vehicles when done occasionally and not as a regular business, or to the transportation of freight or passengers by motor vehicles when done occasionally and not as a regular business, or to the transportation by means of motor vehicles in the regular course of business of employees, supplies and materials by any person, firm or corporation engaged exclusively in the construction or maintenance of highways, or engaged exclusively in logging or mining operations, insofar as the use of

employees, supplies and materials in construction and production is concerned.'

"That none of said acts have been repealed and said Board assumes to and does daily administer each thereof and enforce, and threaten the enforcement of each thereof upon the persons, firms and corporations subject thereto, all of said plaintiff members of said Board daily devoting their time to different duties under said various administrative heads in the multiple areas of official activity assigned and delimited by the Legislative Assembly of the State of Montana to said Board, and using and employing the monies in the Motor Carrier Fund of said Board, hereinafter referred to, for their various official activities under the said multiple administrative heads." (R. 8-11)

C

"'That under date of October 3, 1935 the Board of Railroad Commissioners of the State of Montana, assumed to and did issue to this carrier its certificate sometimes styled 'Permit,' No. 1354, for interstate operations only, assuming and pretending to act pursuant to the provisions of said Chapter 184, Session Laws of 1931, of the State of Montana, which 'permit' assumed to grant to this carrier the right to transport property as a common carrier in interstate service by motor vehicles for hire, over and on the public highways of the State of Montana, and which 'permit' remained in full force and effect until the 9th day of October, 1939, on which latter date the said Board assumed and pretended to issue an order, purporting to cancel and terminate said certificate, or 'permit.' That the 'permit' so issued by the Board related to that class known as 'Class C Motor Carriers' as defined in said Chapter 184 of the Session Laws of 1931.

"That under date of September 19, 1939, the Board of Railroad Commissioners of the State of Montana assumed to and did issue an order directing the carrier herein to appear before it on October 6, 1939, to show

cause, if any, why any right or rights, permit or permits granted it by said Board to operate as a Motor Carrier over the public highways of the State of Montana should not be revoked and cancelled, a copy of said order to show cause, marked Exhibit 'A,' being attached hereto, and by reference, made a part hereof the same as if fully written out herein.

"That on October 6, 1939, this carrier appeared before said Board and filed its written return to said order to show cause, a copy of said return, marked Exhibit 'B,' being attached hereto and by reference made a part hereof the same as if fully written out herein; and then and there at the hearing thereon, there was offered by this carrier and received in evidence sworn credible and substantial testimony in support of said return, and no other evidence was offered by any person or interest, or received at said hearing by said Board.

"That under date of October 9, 1939, the Board issued an order purporting and pretending to cancel and terminate carrier's 'permit' issued as aforesaid, a copy of said purported order of cancellation and termination, marked Exhibit 'C,' being attached hereto and by reference made a part hereof the same as if fully written out herein and therewith advised carrier that any attempt on its part to operate its vehicles over the highways of Montana in the interstate commerce aforesaid, would result in seizure, impoundment and confiscation of its trucks, arrest and trial of its drivers whenever and wherever any of said trucks with drivers were found on the highways of Montana, and the repeated attempt by said Board at infliction of fines and penalties for each and every daily movement of trucks and drivers. Upon receipt of notice of such purported order of termination and cancellation of its permit in Montana, carrier to avoid the seizure and impoundment of its trucks, delays, detentions and conversions of loads in transit, fines and penalties provided in said Chapter 184, Laws 1931, ceased its operations in interstate commerce into, out of or across the said State of

Montana, except with respect to three of its trucks which at the time of receipt of said order were then already in, or nearing, the State of Montana, and which trucks completed the shipments then in actual transit. Since the completion of said shipments so in transit at said time, the carrier did not operate, or attempt to operate any of its trucks or equipment in interstate commerce into, out of or across the said State of Montana, until subsequent to December 5, 1939, as hereafter appears. That this carrier thereupon commenced the preparation of litigation in its behalf, when it was served on or about October 15th, 1939, with the thirty day temporary restraining order herein in this action commenced by the Board on October 13, 1939. That on the date of the issuance of the temporary restraining order in this case, to-wit, on October 13, 1939, as aforesaid this carrier was not operating any of its trucks or equipment into, out of or across the said state of Montana or within the boundaries of the state of Montana and it did not operate of such trucks or equipment within the boundaries of the state of Montana following the issuance of the restraining order herein, until sometime subsequent to December 5, 1939, following dissolution of said restraining order by the above entitled court after hearing upon application of this carrier, said order of dissolution being conditioned on delivery of $5000.00 bond by this carrier as appears in the files herein, for the protection of the tax demands of said Board." (R. 11-13)

The law issues framed by the Board's denials of Sections "G" through "M" of Aero's cross-complaint (R., pp. 21-34 for cross-complaint and R., pp. 50-53 for Board's denials) may be concisely stated, as respects each tax.

1

Law Issues as to "Flat" $10.00 Per Vehicle Tax

(Sections 3847.16-3847.18 Revised Codes, Montana, 1935)

(1) That the vehicle tax is, in terms, applicable only to intrastate operations, i.e., holders of a certificate of public convenience and necessity and not to holders of an interstate "permit" (Section "G" of Cross-Complaint of Aero at end of Section, R. 23 and Par. VI of Board's Answer, R. 50-51).

(2) That the vehicle tax, professedly laid "in consideration of the use of the public highways of this state" (Section 3847.16 (a)) is by a subsequent section of the statute (3847.17) used for "the purpose of defraying the expenses of administration of this act and the regulation of the businesses described in this Act" (Section "G" of Cross-complaint of Aero, R. 22 and Par. III of Board's Answer, R. 50-51).

(3) That if the vehicle tax is by its terms construed to apply to interstate operations,—

it violates the equal protection clause of the 14th Amendment, in that it is exacted without regard for the essential differences between Aero's infrequent use of Montana's highway facilities as opposed to constant use by other truckers;

it violates the commerce clause of the Federal Constitution and the due process clause of the 14th Amendment in that it is an attempt by the State to lay a tax on the privilege of engaging in interstate commerce, indiscriminately covers interstate and intrastate commerce, without apportionment on any basis, is not capable of separation, bears no relationship to the use of the highways, and is exorbitant and excessive as a policing charge (Section H of Board's Cross-Complaint, R. 23-28 and Paragraph VII of Board's Answer, R. 51).

II

Law Issues as to Gross Revenue Tax

(Sections 3847.27 and 3847.28 Revised Codes, Montana, 1935)

(1) The gross revenue tax is, in terms, applicable only to intrastate operations in that it is laid on holders of a certificate of public convenience and necessity and not upon an interstate operator who is exempted from the duty of obtaining such a certificate (Sec. 3847.23, Revised Codes of Montana, 1935). (Section "J" of Cross-Complaint of Aero, R. 29 and Par. IX of Board's Answer, R. 52.)

(2) That if the tax is by its terms construed to apply to interstate operations, it violates the Commerce Clause of the Constitution of the United States, and the due process of law clause of the 14th Amendment, in that,

it is an attempt to collect a tax for the privilege of engaging in interstate commerce, since the carrier has no revenues except such as are derived from interstate commerce;

in that it is indiscriminately applied to both intrastate and interstate business without regard for the substantial distinctions between the two types of business, and Aero's exclusive interstate operations;

in that the tax is laid without apportionment, or basis of apportionment, so as to exclude from its gross effect the right of Aero to engage exclusively in interstate commerce on conditions permitted to the state;

in that the tax is not, in truth, exacted as compensation for the use of the highways, bears no relation to the use of the highways;

in that no part of the proceeds of the tax are used or usable for the construction, improvement, repair or maintenance of any of the highways of Montana;

in that the tax revenues are not allocated for regulation and policing of interstate traffic but are appropriated for "carrying out all the duties of the railroad and public service commission" (Montana Session Laws, 1939, pp. 662 and 665); and,

in that the $15.00 per truck minimum fee as part of the gross revenue scheme is a direct burden on Aero's exclusive interstate commerce (section K of Aero's Cross-complaint, at R. 29-32, and Par. X of Board's Answer, at R. 52).

In Paragraph X of its Answer, the Board attempted to justify the application of the gross revenue tax, in this language:

> Deny each and every allegation, matter and thing contained in Section K thereof, except admit the provisions of Section 17 of Chapter 184, Laws 1931, and admit the appropriation made by the legislative assembly of the State of Montana, but allege that said Chapter 184, Laws 1931, properly and correctly construed does not require the payment of a gross revenue upon all of the interstate revenue or commerce of the defendant and cross-complainant, but requires payment only of that portion of the revenue or commerce of said company carried on within the State of Montana; that ever since the enactment of said Chapter 184 the plaintiffs and cross-defendants and their predecessors in office have continuously and consistently construed the same in this manner, which construction has not heretofore been challenged by anyone or repudiated by the courts in Montana; and that at no time have the plaintiffs and cross-defendants demanded or required of defendant and cross-complainant that it pay a gross revenue fee upon all of its interstate commerce or more than upon that portion of such revenue or commerce of said company carried on within the State of Montana." (R. 52)

Aero moved to strike the attempted justification upon the grounds:

> "(a) the construction attempted to be placed on the provisions of Chapter 184, Laws 1931, by said allegations contradicts the terms of said Chapter (b) the validity of the Chapter is to be determined by what may be done under its terms, and not by what the Board actually does in administration of the Chapter (c) the attempted construction represents and is an attempt by the Board to amend the statute to save it from manifest invalidity, by additions and qualifications within the legislative province only and (4) in that the minimum tax of $15.00 exceeds the ½ of 1% tax on gross revenues of Defendant arising from any segregation or pro-ration of interest revenues accruing from interstate operations involving Montana."

III

Law Issues as to Both Taxes

The carrier alleged that both of said acts assuming to prescribe respectively (a) the Ten Dollar per vehicle "flat" or "straight" fee and (b) the 1 and ½% Gross Operating Revenue fee with a "flat" or "straight" per vehicle minimum, purport to declare that said exactions are levied "in consideration of the use of the highways in the state." That said declarations are of no force or effect, and gratuitous in character in that the further, express terms of both of said acts show upon the face thereof, that said exactions are for the purpose of securing revenues to carry on the whole motor vehicle administration of said Board in all phases and incidents. That, in addition, the Legislative Assembly of Montana has expressly appropriated all of the receipts from said exactions for "carrying out all the duties of the railroad and public service commission" in the multiple fields of administrative activity authorized by the Legisla-

tive Assembly, viz., in brief statement, regulation of railroads, steam and electric, express companies, sleeping car companies, freight line companies, all public utilities of every nature, in Montana, private or municipal, flour mills, grain elevators, boats and pilots on navigable waters, oil pipe lines, producers, refiners and distributors of gasoline, fuel oil, lubricating oil, etc., merchants and sellers of commodities under the Unfair Practices Act, etc., etc. (R. 32-33)

That the roads and highways, and facilities thereof, furnished to the public by the State of Montana are, as to the State Highway System (commonly known as the "Federal Aid Highway System") used by carrier constructed by the United States of America and the State of Montana, the United States bearing 55% of the *cost of construction* and the State bearing 45% of the *cost of construction*. That with respect to the *maintenance* of the State Highway System, and the *construction* and *maintenance* of all other roads and highways in Montana, the cost thereof is provided by the State of Montana. That in all cases the funds provided by the State of Montana are derived entirely from the Motor License and Registration Tax and the Gasoline License Tax (referred to in Section "E" of Aero's Cross-complaint, R. 15-18) and alleged that carrier pays and discharges all of said license tax exactions for which it is liable and notwithstanding its occasional and intermittent use of the State Highway System (and no other State's Roads or highways) as aforesaid. (R. 33)

The Board answered the foregoing allegations by admitting that the two acts declare the tax is laid "in consideration of the use of the highways," admitting the State of Montana pays 45 per cent of the cost of construction of the state highway system, and otherwise denying the allegations. (Section L of Aero's Cross-complaint at R. 32-33 and Par. XI of Board's Answer at R. 53.)

Upon the foregoing issues of law and fact the action was tried by the District Court of the Second Judicial District of the State of Montana, at Butte, on November 2, 1943, before Hon. Jeremiah J. Lynch, District Judge, sitting without a jury (R. 56). The evidence is brief (R. 58-70) and may be conveniently summarized as follows:

E. S. Wheating, Vice-President and General Manager of Aero Mayflower Transit Company, stated that the company, a Kentucky corporation (R. 57), is engaged in business as "interstate motor carriers of household goods"; that it does no intrastate business in Montana; none of its revenues arise from intrastate business in Montana, or from intrastate operations in any state. The company is the holder of Certificate No. 2934, issued by the Interstate Commerce Commission under which it operates between all 48 states. Its operation consists of the movement of "household goods and office furniture and fixtures, and store equipment and fixtures from any point in the United States to any other point in the United States, as long as it is from one state to another." (R. 59)

Prior to the commencement of the action on trial, the company held a Permit (No. 1354) from the Board for operation through the state. (R. 59-60)

Wheating testified that Aero paid for Montana License plate fees in the years 1939-1942, as follows:

Year	1939	1940	1941	1942
Amount	$1535.00	$1250.25	$1330.75	$1195.75

(R. 60).

He further testified that Aero paid for gasoline purchased in Montana for use of its trucks, as follows:

Year	1939	1940	1941	1942
Amount	$553.85	$546.10	$838.50	$681.80

(R. 60-61)

The per mile cost in Montana for these expenditures was about 2⅓ to 2½ cents per mile, against an average throughout the United States of less than 1 cent for each mile traveled. (R. 61)

Testifying with respect to the claim of the Board that, in any event, it could lawfully collect the minimum fee of $15.00 under the gross revenue tax (Section 3847.27, Revised Codes of Montana, 1935) Wheating testified, without objection, that gross revenue based on the Montana load factor for miles traveled in Montana, and using an average income per mile would have been as follows:

Year	1939	1940	1941	1942
Gross Revenue with resulting taxes	$11,961.00	$11,450.00	$17,761.00	$16,160.50
½ of 1% gross revenue	$59.80	$55.23	$88.80	$80.80
$15.00 per vehicle minimum	$660.00	$630.00	$870.00	$1,035.00

(R. 62)

Wheating testified that the figures with reference to equipment using Montana highways in the years 1937, 1938 and 1939, as set forth in Section D of Aero's Answer and Cross-Complaint (R. 13-15) were true and correct (R. 62).

On cross-examination, Wheating testified, over objection, that the Board had not made demand for payment of ½ of 1% on the entire gross revenue of the company (R. 63-64).

Enor K. Matson, Secretary and counsel of the Board, testified at the call of Aero, that the Board has demanded two taxes from Aero, first, the $10.00 per vehicle tax (Section 3847.16) and the $15.00 per vehicle tax stated as the minimum tax under the gross revenue statute (Sec. 3847.27). The Board has always demanded the $15.00 per

vehicle tax, being the minimum demand under the gross revenue tax (R. 67), but would accept ½ of 1% of gross revenues in Montana if the tax receipts on such basis were more than the minimum fee (R. 67, 68).

Paul T. Smith, a member of the Board, corroborated the testimony of Enor K. Matson, Secretary-Counsel, and stated that the Board has not attempted to collect from defendant "the gross revenue fee of ½ of 1% based upon the total revenue of the defendant in all its operations throughout the state." (R. 69)

After the trial the Board tendered proposed findings of fact and conclusions of law (R. 70-73) and Aero did likewise (R. 73-95). The trial court prepared and filed its own findings of fact and conclusions of law (R. 95-97) wherein it determined:

"Findings of Fact

"1. That the plaintiffs, Paul T. Smith, Leonard C. Young and Horace F. Casey are now and for several months past have been the duly elected, qualified and acting members of the board of railroad commissioners of the State of Montana.

"2. That the defendant is now and ever since September, 1928, has been a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky. (R. 95)

"3. That in the years 1937, 1938, and 1939 the defendant owned and maintained a fleet of motor trucks which were used by it in transporting for valuable considerations household goods and office furniture, in interstate commerce exclusively, over and upon the highways of the United States; that during said years it so operated under a permit issued to it by the Interstate Commerce Commission of the United States.

"4. That in the year 1937 the defendant operated twenty-five motor vehicles over and upon the public highways of the State of Montana in the conduct of

its said business; that in the year 1938 the defendant operated forty motor vehicles over and upon the public highways of the State of Montana in the conduct of its said business, and that in the year 1939 the defendant operated forty-four motor vehicles over and upon the public highways of the State of Montana in the conduct of its said business.

"5. That the defendant has refused to pay to said Board of railroad commissioners for the said years 1937, 1938 and 1939 the fees prescribed by Section 3847.16, Revised Codes of Montana, 1935, for the reason as it contends that as to it the said section is invalid; that the defendant likewise has refused to pay to said board for the said years 1937, 1938 and 1939 the annual fees prescribed by Section 3847.27, Revised Codes of Montana 1935, for the reason as it contends that as to it the said section is invalid. (R. 95-96).

"Conclusions of Law

"From the foregoing findings of fact the court draws the following conclusions of law, to-wit:

"1. That section 3847.16 Revised Codes of Montana, 1935, is a valid exercise of legislative authority and should be obeyed.

"2. That section 3847.27 Revised Codes of Montana, 1935, as applied to the defendant is invalid for the reason that it fails to specify any method by which the gross operating revenue of the defendant in the state of Montana for any year may be determined, and for the further reason that the Public Service Commission of the state of Montana mentioned as the administrative body in section 3847.26, 3847.27 and 3847.28, Revised Codes of Montana 1935, has nothing to do with the regulation and supervision of motor carriers using the public highways of the State of Montana.

"3. That the defendant should be restrained and enjoined from operating its motor vehicles over and upon the public highways of the state of Montana until it

has paid the said board of railroad commissioners the sum of two hundred fifty dollars as annual fees for the year 1937, with interest thereon at the rate of six per cent per annum from the 1st day of January, 1938, until paid; the sum of four hundred dollars as annual fees for the year 1938, with interest thereon at the rate of six per cent per annum from the 1st day of January, 1939, until paid; and the sum of four hundred and forty dollars as annual fees for the year 1939, with interest thereon at the rate of six per cent per annum from the 1st day of January, 1940, until paid." (R. 96-97).

Judgment was entered (R. 97-98) whereby Aero was "restrained and enjoined from operating its motor vehicles over and upon the public highways of the State of Montana until it paid" the $10.00 per vehicle tax for 1937, 1938 and 1939 demanded by the Board (R. 97-98).

The Board appealed to the Supreme Court of Montana from that part of the judgment holding the gross revenue tax invalid and unconstitutional (R. 99). Aero appealed to the Supreme Court of Montana from that part of the judgment holding the $10.00 per vehicle tax valid (R. 99-100).

Upon the appeal the Supreme Court of Montana affirmed the validity of both kinds of taxes (R. 119) and Aero is now under injunction (except for supersedeas) restraining and enjoining it from operating its motor vehicles in interstate commerce over and upon the public highways of the State of Montana until it pays all taxes claimed by the Board to be due, or hereafter to become due (R. 154-157).

Specification to the Assigned Errors to Be Urged

A

As respects the "flat" or "straight" $10.00 per vehicle annual tax imposed by sections 3847.16, 3847.17 and 3847.18, Revised Codes of Montana, 1935:

I

The Supreme Court of the State of Montana erred in holding that the tax assailed is not in violation of the commerce clause of, and also, the due process clause of the Fourteenth Amendment to, the Constitution of the United States, and in prohibiting petitioner from operating in interstate commerce until the tax is paid.

II

The Supreme Court of the State of Montana erred in holding that the tax assailed is not in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and in prohibiting petitioner from operating in interstate commerce until the tax is paid.

III

The Supreme Court of the State of Montana erred in gratuitously reading into section 3847.16, Revised Codes, Montana, 1935, and its related section 3847.17, the assumption that the tax was exacted to build, maintain and supervise the highways of Montana and using that assumption to justify the exaction against petitioner, engaged exclusively in interstate commerce, when the said statutes expressly negative any such purpose.

IV

The Supreme Court of Montana erred in sustaining the "flat" or "straight" $10.00 per vehicle tax as a direct burden on interstate commerce, and prohibiting petitioner from operating exclusively in interstate commerce unless such tax is paid, since the tax on its face bears no relation whatever to the use of the public highways of the State of Montana by petitioner.

V

The Supreme Court of Montana erred in sustaining the "flat" or "straight" $10.00 per vehicle tax, the proceeds of which, by the words of section 3847.17, Revised Codes of Montana, 1935, "shall be available for the purpose of defraying the expenses of the administration" of the Montana Motor Act "and the regulation of the businesses herein described," as against petitioner, who operates in interstate commerce only, since the tax on its face bears no relation to the asserted uses or purposes of its levy.

VI

The Supreme Court of Montana erred in sustaining the "flat" or "straight" $10.00 per vehicle tax as compensation for the use of the highways of Montana, when the tax is by its terms and necessary effect, and despite its self-serving pretensions, is a direct state tax levied for the privilege of carrying on interstate commerce over the public highways of Montana.

VII

The Supreme Court of Montana erred in applying the "flat" or "straight" tax of $10.00 per vehicle against petitioner's exclusive interstate operations, since the tax on its face is not in any manner related to or apportioned to, such operation.

VIII

The Supreme Court of Montana erred in mis-reading and in mis-applying to the Montana statutes in question, sections 3847.16, 3847.17 and 3847.18, Revised Codes of Montana, 1935, the decisions of the Supreme Court of the United States in,

Clark v. *Poor*, 274 U. S. 554, 47 Sup. Ct. 702, 71 Law Ed. 1199;

Interstate Transit, Incorporated v. *Lindsey*, 283 U. S. 183, 51 Sup. Ct. 380, 75 Law Ed. 953; and

South Carolina State Highway Department v. *Barnwell Bros.*, 303 U. S. 177, 58 Sup. Ct. 510, 82 Law Ed. 734.

IX

The Supreme Court of Montana erred in holding that sections 3847.16, 3847.17 and 3847.18 are applicable to interstate commerce, or petitioner's exclusive interstate operations at all.

B

As respects the Quarterly Gross Revenue tax on the interstate carriers' gross revenues, imposed by sections 3847.27 and 3847.28, Revised Codes of Montana, 1935:

I

The Supreme Court of Montana erred in holding that the quarterly gross revenue tax assailed is not in violation of the commerce clause of, and, also of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and in prohibiting petitioner from operating in interstate commerce until such tax is paid.

II

The Supreme Court of Montana erred in holding that the quarterly gross revenue tax assailed is not in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and in prohibiting petitioner from operating in interstate commerce until tax is paid.

III

The Supreme Court of Montana erred in holding that the State of Montana has power, as a condition of permitting petitioner to engage in interstate commerce over the public highways, to impose a tax upon petitioner who operated over its public highways exclusively in interstate commerce, based upon gross receipts to petitioner derived solely from interstate commerce, absent any attempt by the legislature at apportionment, a method, formula or device, for apportionment.

IV

The Supreme Court of Montana erred (a) in gratuitously assuming, in the face of section 3847.27, Revised Codes, Montana, 1935, stating that the tax is imposed on the gross operating revenue of the carrier, that the tax is imposed only on "gross revenue derived from operations in Montana," however determined, and (b) in itself endeavoring to invent or supply a taxable base of gross revenues as between Montana and the national area outside Montana, when the statute refers to "the gross operating revenue of the carrier," i.e., this petitioner's total interstate revenues, as the taxable base.

V

The Supreme Court of Montana erred in holding that the State of Montana has power to levy a tax on the inter-

state revenues of a carrier engaged exclusively in interstate commerce, as a condition of that carrier operating over the highways of Montana, when the legislative assembly has utterly failed to provide, any method whatever of relating the tax to the use, and permits a Board or unidentified persons to invent any method of apportionment in any single instance.

VI

The Supreme Court of Montana erred in gratuitously assuming, as a premise to its conclusion upholding the gross revenue tax that there are gross revenues derived by petitioner "from operations in Montana" to which the tax could be made to apply, in the face of the fact as found by said court, that petitioner operates exclusively in interstate commerce, and derives its revenues solely from that commerce, and, on such gratuitous assumption, prohibiting petitioner from operating in interstate commerce.

VII

The Supreme Court of Montana erred in upholding the validity of the gross revenue tax against the challenge of the constitutional objections made by petitioner when the Act utterly fails to provide, or to suggest, any method of apportionment between "gross revenue derived from operations in Montana" and gross revenue elsewhere.

VIII

The Supreme Court of Montana erred in its attempt to immunize the statute against the constitutional objections, in that, under the guise of statutory construction, it assumed to legislate into the statute a restriction confining the operation of the gross revenue tax to "gross revenue derived from operations in Montana," when the legislative assembly by the words of the statute applied the tax to "the gross operat-

ing revenue of the carrier," and the Supreme Court of the United States can not be bound by any such perversion of language.

IX

The Supreme Court of Montana erred in that, after assuming to legislate into the statute a restriction confining the operation of the tax to "gross revenue derived from operations in Montana," it found no method provided in the statute for ascertaining such alleged Montana revenues, i.e., by road mileage traveled in the state, number of vehicles, road hours, cargo, volume of traffic, ton miles, vehicle miles, or any other factor or combination of factors, and yet enjoined petitioner from operating exclusively in interstate commerce until it paid a tax which could not be ascertained, except by guesswork by some unidentified agency.

X

The Supreme Court erred in that it finally concluded that the $15.00 minimum per vehicle annual tax imposed by the gross revenue statute could be put into effect "even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue is (opinion apparently omits language here) not provided," thus making such tax an arbitrary minimum charge for the naked privilege of engaging in interstate commerce, in violation of the commerce clause and the Fourteenth Amendment to the Constitution of the United States.

XI

The Supreme Court of Montana erred in holding that petitioner, engaged exclusively in interstate commerce, may be subjected to a percentage tax on gross revenues, as a condition of using the public highways of Montana in interstate commerce, when no formula, guide, standard or meas-

ure of tax is stated by the statute, or when no agency of the State is delegated authority, under legislative safeguards, to compute such tax on stated or ascertainable factors.

XII

The Supreme Court of Montana erred in construing sections 3847.27 and 3847.28, Revised Codes of Montana, 1935, to be applicable to interstate commerce, at all.

Summary of the Argument

ARGUMENT

Rationale and Effect of State Court Decision

I. The Obtrusive Internal Errors in the State Court's Opinion Deprive It of Force

Since this Court is called upon to review the decision of the highest Court of the State of Montana, the precise premise, the rationale, and the particular effect of the State Court's decision must be ascertained. And the presence of manifest, palpable and repeated errors in an opinion at least suggests that the subject matter did not receive that painstaking examination which it requires, in the area of State's rights and interstate commerce.

In the majority opinion, written by Mr. Justice Morris, it is said:

"There is no dispute as to the facts . . ." (R. 104) and, immediately following that statement, the author says:

> "The Company is engaged in the motor transportation of used or second hand household goods and office furniture from one state to another for hire. It does not transport any goods of any nature or kind from one point to another in the same state. The only transportation it engages in, in so far as it concerns this state, is the transportation of goods from another state to some point in this state, or it passes through this state to a destination in some third state." (R. 104)

This language seems entirely sufficient to warrant the conclusion that the Montana Court agrees that the carrier is engaged, exclusively, in interstate commerce. Since that activity is a privilege granted and protected by the Federal Constitution, (*Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 56-58; *Freeman* v. *Hewit*, No. 3, October Term, 1946, — U. S. —) it follows that the authority of the State must be

exercised within the area open to State action. And, undoubtedly, the State may, within permissible limits, impose taxes on those who pursue the privilege, even though such action affects interstate commerce, the limits being determined, in the last analysis, by the Congress, or by this Court. While interstate commerce must pay its way, the State may not exact a charge which in every day practice bars the way, or hampers movement along the way.

(1) *Erroneous premise of opinion:*

The authority of the majority opinion of the Supreme Court of Montana, in seeking a basis for the State's direct exactions on interstate commerce stated in the first paragraph of the opinion:

> "This controversy involves the question as to what extent a state may impose burdens in the way of licenses and taxes upon motor carriers engaged in interstate commerce for operating their vehicles over the highways of the state. Such exactions are imposed upon the presumption that the state owns the highways within its borders, *and the exactions are imposed as compensation for their use, and the revenue derived therefrom shall be expended to build, maintain and supervise such highways.*" (R. 103)

Passing over the fact that the carrier here is engaged *solely* in interstate commerce, as stated in the opinion, above, the statement that the taxes are exacted as compensation for the use of the highways,

> "and the revenue derived therefrom shall be expended to build, maintain and supervise such highways,".

is not correct.

Sections 3847.16, 3847.17 and 3847.27 covering both the $10.00 flat per vehicle tax and the ½ of 1 per cent gross

revenue tax, *place the tax revenues in the motor carrier fund* which

> "shall be available for the purpose of defraying the expenses of administration of this Act (the Motor Carrier Act) and the regulation of the businesses herein described." (Section 3847.17)

Not one cent goes to build any Montana highway.
Not one cent goes to maintain any Montana highway.
Not one cent goes to supervise any Montana highway.

Such erroneous statements are the very foundation—the continuing rationale—of the opinion, for thereafter they are twice repeated in the opinion, and were left unchanged after the petition for rehearing pointed out their erroneous character (R. 126-127).

In dealing with the flat vehicle tax, the opinion of the Montana Court (R. 112) again states:

> "The foregoing authorities clearly establish the right of the state to impose upon motor carriers engaged in interstate commerce exactions by way of taxes and license *for use by such motor carriers of the state highways when such exactions are necessary to build, maintain, and supervise the highways.* In addition the exactions must be such as are reasonably necessary for the purposes mentioned, and must not be discriminatory as between state and interstate carriers."

The author of the opinion then proceeds to say that the taxes exacted by Montana are, in fact, used for such purposes.

In the next to the last paragraph of the opinion, page 21, (R. 118) it is said:

> "In the case at bar Montana owns the highways over which the company operates its vehicles and the taxes imposed are for the use of the state highways. The revenue collected is devoted to the building, repairing

and policing of such highways, and that which the state furnishes is an aid, not a burden to interstate commerce."

The Board of Railroad Commissioners in this case did not make any contention in the trial court or in the Supreme Court of Montana that the revenues from these license taxes were to be used for *building, maintaining or supervising highways.* The Board could not do so, and claim the fees. State Highways in Montana, including all Federal Aid Highways, are constructed, maintained and supervised by the State Highway Commission (Sections 1783-1800, R. C. M. 1935, as amended by Ch. 86, Laws 1945 and Section 2396.2 R. C. M. 1935. Traffic on such highways is supervised by the Commission through the Montana Highway Patrol (Sections 1741.2-1741.12, R. C. M. 1935, as amended). County highways may be constructed and are under the supervision of the Board of County Commissioners in each county (Sections 4465.3, 4486.1 and 4486.2, R. C. M., 1935, to the exclusion of respondent Board. The revenue is for "*the expenses of administration of this Act* (Motor Carrier Act) *and the regulation of the businesses herein described,*" (Sec. 3847.17 and Sec. 3847.28, Revised Codes, Montana, 1935), *a far different purpose than highway building, repair and supervision.* The Board had in fact admitted that revenues for building, maintaining and supervising the highways in Montana arise from the Registration and License Plates tax and the gallonage tax on gasoline (Sec. E of Aero's Cross-Complaint (R. 15) and Pars. III and IV of Board's Answer (R. 49-50). Before Aero can operate any vehicle over any highway in Montana, it must pay the Registration and License Plate fee (Sections 1759, 1759.7, 1760, 1760.1-1760-7, and before registration may be completed and license plates issued, Aero must pay all applicable *ad valorem* taxes on each vehicle

(Ch. 72, Laws of Montana, 1937, as amended by Ch. 154, Laws of Montana, 1943).

Thus, it is seen that the opinion begins and concludes on the erroneous statement that the revenues from these taxes are for highway building, repair and supervision. The attention of the Court was called to the fact that revenues for highway building, repair and supervision come only from gasoline license taxes in Montana collected by the State Board of Equalization and administered by the Montana Highway Commission, and that the Board of Railroad Commissioners has nothing to do with such exactions. (Petition for Rehearing, R. 126-129) The Court had, in effect, said the same thing when it noted the statutes which are the sources of highway revenues (R. foot of p. 104 and 105).

The idea that these revenues attempted to be exacted from Aero are for highway construction, maintenance, repair and supervision, is so firmly fixed in the court's minds, apparently, that the opinion cites *Interstate Transit* v. *Lindsey*, 283 U. S. 75 L. Ed. 953, in support of its reasoning. But in that case, Mr. Justice Brandeis, writing the opinion for the United States Supreme Court, *invalidated a Tennessee statute for the very reason that the tax* "was not," in the court's words, "exacted for such purposes," i.e., construction or maintenance of highways or bridges, "but merely as a privilege tax on the carrying on of interstate business." The Justice pointed out that in Tennessee, as in Montana, the revenues for highways came from other taxes. The Lindsey case is a plain, unassailable authority for Judge Lynch's decision in the lower Court. And yet the opinion in this case (R. 107-110) uses it as authority to bolster the erroneous assumption that the Montana taxes

are dedicated to building, maintaining and supervising highways in Montana.

Whether a majority of the Montana Supreme Court would have reached a different result on a more careful reading of the record, and upon full consideration of the meaning of *Interstate Transit v. Lindsey*, is an interesting speculation. The dissenting Justice infers that the problem of maintaining the highways of Montana led the majority to "judicial edict." He said:

> "The majority opinion is based upon and attempted to be supported by the fallacious premise that the exactions in question 'are imposed upon the presumption that the state owns the highways within its borders, and the exactions are imposed as compensation for their use, and the revenue derived therefrom shall be expended to build, maintain and supervise such highways.' I can find no support for any such presumption. I fully appreciate the problem of maintaining our highways, and the necessity of exacting a fair compensation for their use by foreign-owned trucks, but I cannot, as a matter of expediency, lend my support to the exaction of such compensation by judicial edict." (R. 119-120)

And again:

> "I think there can be no question but that the state has power, by appropriate legislation, to require compensation for the use of its highways by vehicles engaged in interstate commerce. I further think that such legislation must emanate from the legislative arm of the state government. This court may, perhaps, point out that the state is overlooking a possible source of revenue for the maintenance of its highways, but may not enact the legislation for the purpose of its collection, under the guise of judicial interpretation." (R. 123)

(2) *Failure to find apportionment formula:*

There are other errors in the majority opinion of the Montana Court which vitiate its rationale. At R. 115 the opinion states:

> "By reading sections 3847.27 and 3847.16 together, which the rule on statutory construction enjoins, State *v.* Bowker, 63 Mont. 1, 205 Pac. 961, it becomes clear that the clause in section 3847.27 imposing upon the company a tax of one-half of one per cent based upon its 'gross operating revenue' that in the use of this phrase by the legislature the gross revenue derived from operations in Montana was intended and not the company's gross revenue from all sources. No other reasonable intention is conveyed by paragraph (b) of section 3847.16 which is as follows:
>
> "'When transportation service is rendered partly in this state and partly in an adjoining state or foreign country, motor carriers shall comply with the provisions of this act relating to the payment of compensation and to the making of annual or special reports or statements herein required, and shall show the total business performed within the limits of this state and such other information concerning its operation within this state as may be required by the board as fully and completely and in the same manner as herein required of motor carriers operating wholly within this state.'" (R. 115)

At R. 115, the opinion continues:

> "It was said in *United States v. Freeman*, 3 Howard 565, (44 U. S. 548), 'A thing which is within the intention of the makers of the statute, is as much within the statute as if it were in the letter.' Even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue is not provided by the statute, a contention to which we do not agree, *no difficulty would arise in putting into effect the minimum*

fee of $15.00 required for each company vehicle operated within the state."

In its anxiety to supply a method or formula for apportioning revenues to Montana, the court grasps at a phrase in paragraph (b) of Section 3847.16, providing for the flat vehicle tax, which requires motor carriers in their annual or special reports to show "the total business performed within the limits of this state." This phrase is equally meaningless, when applied to interstate commerce (if it does apply to that commerce) for no business is executed and completed in Montana by this interstate carrier in the sense of full performance within the limits of Montana, no method of separating revenues is set forth, and "business" is an aggregate term totaling many activities and incidents other than revenues. The phrase "show the total business performed within the limits of this state," appears in the $10.00 per vehicle tax statute (Sec. 3847.16) enacted in 1931 (Sec. 16 of Ch. 184, Laws of Montana, 1931) some four years before the ½ of 1% gross revenue statute was enacted in 1935 (Sec. 2 and 3 of Ch. 100, Laws 1935). The Montana court would construe the statutes "together", *i.e.*, supply the missing apportionment formula for the gross revenue tax, the later enactment, out of the quoted language in the vehicle tax statute, the antecedent enactment. But the later gross revenue tax statute expressly directs the carrier to *"file with the public service commission, a statement showing the gross operating revenue of such carrier."* Hence, even if the quoted phrase from the earlier act could be tortured into a statement of a method or formula for apportionment, it must fall under the later legislative direction to report "the gross operating revenue of such carrier." The later statute carries its own directions as to reporting. *Of course the fact is that the phrase furnishes no method of apportionment whatever.*

The opinion of the Montana court in effect recognizes that there is no thought of apportionment and no method for realizing it when it finally says,

> "It was said in United States *v.* Freeman, 3 Howard 565 (44 U. S. 548) 'A thing which is within the intentions of the makers of the statute, is as much within the statute as if it were in the letter.' *Even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue is not provided by the statute,* a contention to which we do not agree, *no difficulty would arise in putting into effect the minimum fee of $15.00 required for each company vehicle operated within the state.*"

It seems to us that a complete answer to this kind of "construction" is as follows:

The commerce clause forbids discrimination, whether outright or ingenious.

Welton v. *Missouri*, 91 U. S. 275, 282-283;
Guy v. *Baltimore*, 100 U. S. 434;
Webber v. *Virginia*, 103 U. S. 344;
Hale v. *Binco Trading Co.*, 306 U. S. 375.

(3) *Confusion in opinion respecting the minimum fee under the gross revenue tax.*

A further obtrusive error in the opinion stems from the State court's confusion respecting the $15.00 minimum. The opinion says as to it, ". . . no difficulty would arise in putting into effect the minimum fee of $15.00 required for each company vehicle operated within the state" (R. 115, at foot of page). This fee is part of the tax on "gross operating revenue" of the carrier. *It depends upon the presence of some operating revenue,* a mill, a cent, a dollar, or more,—any amount of gross revenue less than the

amount which on the basis of ½ of 1% will yield a total of $15.00 in a year. The legislative command, in effect, is:

> "Pay ½ of 1% of gross revenue earned each quarter of the year, but not less than $15.00 per annum for each vehicle operated by the carrier under the act during that period."

Unless the carrier earns some revenue the Board is not entitled to tax on a vehicle basis at all, for the vehicle tax may be invoked only as a minimum, *i.e., the smallest amount payable under the gross revenue tax. It is the tail that goes with the hide* of gross revenue. It is not a vehicle tax as such. That kind of a tax has already been imposed under the $10.00 per vehicle tax prescribed by Section 3847.16. The necessity for some proper apportionment of the carrier's gross interstate revenues does not disappear because the gross will yield less than $15.00 per annum. The minimum, calculated on a vehicle basis, can be paid only by a contribution from gross interstate revenues; the carrier has no other revenues. The revenues remain gross revenues; the revenues remain interstate revenues; the vehicles remain interstate vehicles, and the carrier continues to be enjoined from carrying on interstate commerce across Montana, or some part of it, when Montana will not take the pains to levy a tax based on its relation to that commerce. Whether the carrier operates one vehicle across Montana, or some part of it in a year at a tax of $15.00, or two hundred vehicles, at a tax of $3000.00, is immaterial; apportionment continues absent.

In its effort to escape the consequences of non-apportionment by the legislature, the Court treats the $15.00 per vehicle minimum under the gross revenue statute as a separate tax, a tax which is to stand when the gross revenue feature falls. It is driven to this judicial separation because "no difficulty would arise in putting into effect the minimum fee

of $15.00 required to each company vehicle operated within the state," *i.e.*, the arithmetic is easy: 1 (vehicle) × $15.00 is $15.00 and 2 (vehicles) × $15.00 are $30.00. But the legislature did not authorize the Board to drop the ½ of 1% to be applied to gross revenues for easier arithmetic, except when its application would not supply $15.00 per annum. The use of the percentage factor could be dispensed with when it was not worth $15.00.

II. Neither the Structural Integrity of the State Court's Opinion Nor the State Statutes Can Escape Examination by This Court on the Theory That the "Construction" of the Statutes by the State Court Is Controlling.

The Board, in its Statement Opposing Jurisdiction (Statement, 3-6) proceeds on the theory that the construction of the statutes was for the State court alone, that such construction was binding on this Court, and must be followed by this Court, right or wrong. It insisted in such statement, and doubtless will insist here——

(a) As to the $10.00 per vehicle tax (Sections 3847.16 and 3847.17) that because the State Court—in the very teeth of the text of the statute itself—held that this tax (as well as the proceeds of the gross revenue tax) were expended to build, maintain and supervise the highways of Montana (Majority Opinion, R. 102, 112, 118-119) that construction must be accepted by this Court, if such holding is essential to sustain the statute. Of course, if this Court is bound by obtrusive, palpable errors of the lower court under the guise of "construction," then the maintenance of Federal authority would soon terminate, because a State Court could, by "construction" supply any deficiency or eliminate any error and thus remove any possibility of successful challenge. Fortunately, such a result is not countenanced. Construction or interpretation of a statute does not include

judicial legislation. An anomalous situation cannot be remedied by judicial construction in derogation of positive and controlling legislation.

Whitehead v. *Galloway*, 249 U. S. 79.

A *casus omissus* in a statute does not justify judicial legislation, and a court may not undertake to supply a provision left out of a statute whether by design or by mistake.

Hobbs v. *McLean*, 17 U. S. 567.
Ebert v. *Poston*, 266 U. S. 548.
United States v. *Monia*, 317 U. S. 424.

Moreover, the doctrine as to the binding effect of the State Court's construction cannot bar vigorous ransacking here of the statutes for their real meaning and practical effect. In *St. Louis Southwestern Ry Co.* v. *Arkansas*, 235 U. S. 350, at 362, this Court said:

> "Upon the mere question of construction, we are of course concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, *nor upon the characterization of that scheme as adopted by the State Court.* We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State."

This rule has been consistently applied.

Kansas City v. *Kansas*, 240 U. S. 227, 231.
Mountain Timber Co. v. *Washington*, 243 U. S. 219, 237.
Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292.
Standard Oil v. *Graves*, 249 U. S. 389.
Corn Products Mfg. Co. v. *Eddy*, 249 U. S. 427, 432.
St. Louis Cotton Compress Co. v. *Arkansas*, 260 U. S. 346, 348;

Hanover Ins. Co. v. *Harding*, 272 U. S. 494, 507-510.
New Jersey Tel. Co. v. *Tax Board*, 280 U. S. 338.
Gregg Dyeing Co. v. *State*, 286 U. S. 472, 476.
Wisconsin v. *J. C. Penney Co.*, 311 U. S. 435, 443.

In the New Jersey case above, it is said:

"The language of the act and the decisions of the courts of the state are to be given consideration in determining the actual operation and effect of the tax. But neither is necessarily decisive for, whatever the terms used by the legislature to impose the tax or by the courts in reference to it, the law cannot be sustained if it operates to burden or regulate interstate business. Galveston, H. & S. A. R. Co. *v.* Texas, 210 U. S. 217, 227, 52 L. Ed. 1031, 1037, 28 Sup. Ct. Rep. 638; Quaker City Cab Co. *v.* Pennsylvania, 277 U. S. 389, 401, 72 L. Ed. 927, 929, 48 Sup. Ct. Rep. 553; Macallen Co. *v.* Massachusetts, 279 U. S. 620, 625, 73 L. Ed. 874, 878, 65 A. L. R. 866, 49 Sup. Ct. Rep. 432." (74 L. Ed. 468)

And in the *Wisconsin* case, this Court said:

"A tax is an exaction. Ascertainment of the scope of the exaction—what is included in it—is for the state court. But the descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction. 'In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' Henderson *v.* Mayor of New York, 92 U. S. 259, 268. Such has been the repeated import of the cases which only recently were well summarized by the guiding formulation for adjudicating a tax measure, that in passing on its constitutionality we are concerned only with its practical operation, not its definition on the precise form of descriptive words which may be applied to it. Lawrence *v.* State Tax Commission, 286 U. S. 276, 280."

Wisconsin v. *J. C. Penney Co.*, 311 U. S. 435, 443.

The same claim for immunity on the ground of "construction" was made by the Board.

(b) As to the Gross Revenue Tax (Sections 3847.27 and 3847.28). Indeed, it is with respect to this tax that the Board labors its "construction" argument most strongly. The Supreme Court of Montana did not find, and it could not find in Sections 3847.27 and 3847.28 any language that suggested that the legislature had the subject of (a) apportionment or (b) method of apportionment in mind. By Section 3847.27, every motor carrier must, quarterly, file a statement with the commission—

> "showing the gross operating revenue of such carrier"

and pay to the board

> "a fee of one-half of one percent of the amount of such gross operating revenue."

Obviously, all the gross operating revenue of the carrier, the corporation, is the base for application of the percentage—nothing less. That base is explicitly stated and repetitively emphasized, "such gross operating revenue" of the carrier.

The Board argues that "the only possible point of uncertainty in the statute was as to whether the gross revenue intended in Section 3847.27 was that on operations in Montana or total operations" (Board's Statement Opposing Jurisdiction, P. 5) and asserts that "the Montana Court has removed that uncertainty and 'decided' that the gross revenue intended is only that on operations in Montana" (*Idem.* P. 5). But that is not enough. The Supreme Court of Montana can no more ignore the substance of things where a Federal right is concerned than the Board can claim a right to tax some part of interstate revenues without pointing to its authority.

Paragraph (b) of Section 3847.16, which the State Court relies upon to remove the uncertainty as to what gross revenues are intended to be burdened, commands the exclusive interstate carrier to "comply with the provisions *of this Act* (Opinion of State Court, R. 115), relating to the payment of compensation," *i.e.*, the act relating to the $10.00 per vehicle tax—not the gross revenue act, passed four years later! This direction as to compensation has nothing to do with the gross revenue act at all. The latter Act directed the carrier to report its "gross operating revenue, not the total business," performed within the limits of the State. For the Montana Court to say that the paragraph has "but one purpose," *i.e.*, to ascertain the gross revenue derived by the company's operations in Montana in order to use that as a basis for the levy of the tax of one-half of one per cent," when the gross revenue tax enacted four years later prescribes the contrary, *i.e.*, system gross revenue, goes beyond construction and becomes unadulterated wishful thinking. That the Montana Court is conscious of this fact, is proved by its next utterance,

> "*Even if it be admitted that the manner of arriving at a sound basis upon which the* tax on gross revenue is not provided by the statute, * * * no difficulty would arise in putting into effect the minimum fee of $15.00," etc. (Opinion of State Court, R. 115)

By that language the Montana court really abandons hope of making the gross revenue statute operative. It next expresses its "opinion" that when the legislature enacts a statute imposing the duty of enforcement of such statute upon "the Board, but fails or neglects to clearly prescribe and incorporate in the Act the mode of enforcement," the Board "may adopt any fair and reasonable mode of enforcement designed to effectuate the purposes

of the Act" (Opinion of State Court, R. 116). *This expression, too, assumes the presence of a statutory duty to apportion according to some stated principle, not by guess.* When we remember that Paragraph (b) of Section 3847.16, counted on by the Montana Court to save the gross revenue tax, was speaking of the vehicle tax of $10.00 per vehicle, it becomes clear that the Montana legislature had no such thought of "enforcement," in mind, *i.e.*, a mode to be selected by the Board. The $10.00 vehicle tax involved merely a count of vehicles; no attempt at apportionment is present. But even if we concede, in aid of the State Court's effort, that such a principle is recognized in a proper case, this is not such a case. In order to render admissible such delegation of legislative power, it is necessary that the statute lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests and with such degree of certainty as the nature of the case permits, and enjoin a procedure under which both public interests and private rights shall have due consideration. Otherwise the attempt to delegate is a nullity, particularly in the presence of Federal rights.

Wichita, etc. Co. v. *Pub. Utilities Com.*, 260 U. S. 48, 59;

Hampton I. Co. v. *U. S.*, 276 U. S. 394, 405;

Panama Refining Co. v. *Ryan*, 293 U. S. 388, 426;

Schechter Poultry Corp. v. *U. S.*, 295 U. S. 495, 530.

The Montana Court, in its anxiety to uphold the gross revenue tax overlooks the fact that the State has an equal, or stronger, interest in (a) a proper allocation of gross revenues and (b) the means of insuring such allocation, for, absent such allocation and method, it may not levy tax tribute for its highways.

Carefully read, the opinion of the Montana Court sup-

plies no salvage by way of construction. In the final analysis it is a confession that "gross revenue in Montana" whatever that may mean—cannot be ascertained by the statute. This has not only been tacitly admitted by the Board throughout the litigation—it has been the subject of affirmative declaration. Confronted with a statute supplying as the only revenue base "the gross operating revenue of such carrier," and without a method of apportionment, the Board began to improvise.

At the trial, it endeavored to show that it had never made demand for payment of ½ of 1% on the entire gross revenue of the company (R. 63) but had confined its demand to the $15.00 minimum per vehicle fee (R. 66).

The Board's Secretary-Counsel testified that he could not recall that the Board had, in fact, ever made any demand on Aero for a tax based on any attempted apportionment between inter- and intra-state revenues (R. 67). This attempt by the Board to excuse the statute by non-enforcement, met timely objection:

> "Q. Has it ever made any demand of your company for payment of ½ of 1% on the gross revenue of the entire gross revenue of the company?
>
> "Mr. Toomey: To which objection is made on the ground and for the reason that the statute in question provides that the Board shall collect ½ of 1% of the gross revenue from the carrier, subject to a minimum of $15.00 per vehicle and that there is no language in the statute and no suggestion in the statute that the tax shall be applicable to any revenues that arise from any part of the interstate operations in Montana. And upon the further grounds that under the law, the statute is to be tested not by what the Board actually does under it in administration, but what may be done under the statute.
>
> "The Court: The objection is overruled.
>
> "A. No, not to my knowledge.

"By Mr. Matson:

"Q. As a matter of fact, the demand of the Board of Railroad Commissioners, prior to the bringing of this action, was for the minimum under the gross revenue, was it not, the minimum of $15.00 per vehicle?

"A. It was for the minimum of $15.00 per vehicle for, I presume, the percentage of our Montana revenue. I don't know that they computed the percentage, and on account of the rather limited operation in the state, I presume they thought they might collect the minimum." (R. 63-64)

But the successor members of the existing Board may take a sterner view of their duty. In any event, the Federal right to engage in interstate commerce cannot be suspended on the mere will of administrative officers—as to whether they choose to enforce or choose to ignore a state statute.

"The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

Roller v. *Hardy*, 176 U. S. 398, 409.

"The law itself must save the parties' rights and not leave them to the discretion of the courts as such."

L. & N. R. R. Co. v. *Stock Yards Co.*, 212 U. S. 132, 144.

"The constitutional validity of a law is to be tested not by what has been done under it, but what may be done under it. (State ex rel. Redmen *v.* Meyers, 65 Mont. 124, 210 Pac. 1064; State ex rel. Holliday *v.* O'Leary, 43 Mont. 157, 115 Pac. 204.) It must be borne in mind that the board of railroad commissioners is not a mere fact finding instrumentality of the government. It is a quasi-judicial body with power to hear and determine controversies and to make lawful orders based upon its findings."

C. M. & St. P. Ry. Co. v. *Board*, 76 Mont. 305, at 318, 247 Pac. 162.

If it be conceded that the State Court could, by judicial legislation declare that the statute operated only on the gross operating revenue of the carrier in Montana, it must be admitted that no method of apportionment is supplied. The absence of such a method suggests that the legislature did not have in mind any separation of revenues. The Board's offer to quit any attempt at apportionment and rely solely on the minimum suggests that it realizes the State Court did not find and could not announce any method of apportionment. The statute might have been drawn so as to reach only that part of gross interstate revenues arising, let us say, from earnings on miles traveled in Montana, but it was not drawn that way, and it must be applied in accordance with its language.

The Post-Appeal Legislation

After appeal to the Supreme Court of the United States was perfected (R. 152) the Legislative Assembly of Montana enacted Chapter 73, Laws of Montana, 1947 (pp. 88-90 of 1947 Session Laws) *amending* Sections 3847.26 and 3847.27 R. C. M. 1935. Section 2 of Ch. 73, Laws 1947, amended the gross revenue tax, with resulting current text as follows:

> "3847.27. *Additional Fees Covering Motor Carriers.* In addition to all other licenses, fees and taxes imposed upon motor vehicles in this state and in consideration of the use of the highways of this state, every motor carrier holding a certificate of public convenience and necessity *or permit* issued by the *board of railroad commissioners,* shall between the first and fifteenth days of January, April, July and October of each year, file with the *board of railroad commissioners* a statement showing the gross operating revenue of such carrier for the preceding three (3) months of operation, or portion thereof, and shall pay to the board a fee of one-half of one (1) per cent of the amount

of such gross operating revenue; *and in the event that such carrier operates in interstate commerce, the gross operating revenue of such carrier within this state shall be deemed to be all the revenue received from business beginning and ending within this state, and a proportion based upon the proportion of the mileage within this state to the entire mileage over which the business is done of revenue on all business passing through, into or out of this state;* provided, however, that the minimum fee which shall be paid by each Class A and Class B carrier for each vehicle registered and/or operated under the provisions of the motor carrier act shall be thirty dollars ($30.00) and the minimum annual fee which shall be paid by each Class C carrier for each vehicle registered and/or operated under the motor carrier act shall be fifteen dollars ($15.00)." .

The Act has no retroactive effect, Section 3 thereof giving it force and effect, *"from and after its passage and approval"*. (p. 90). However, the amendments found necessary by the legislature (laying aside any questions as to their validity) indubitably exhibit that Aero's position with respect to the section before amendment—the subject of this present inquiry for all taxes from 1937 through 1946—is well taken. The amendatory legislation attempts to do that which the prior legislation did not do, *viz.*,

(1) makes the gross revenue tax applicable to an interstate carrier operating under a "permit" as well as a carrier operating under a certificate of public convenience and necessity;

(2) provides that gross revenues of the carrier shall be taken to mean "all the revenue received from business beginning and ending within this state" (sic), and

(3) attempted apportionment, by declaring that as to such business, "a proportion based upon the pro-

portion of the mileage within this state to the entire mileage over which the business is done of revenue on all business passing through, into, or out of this state" was to be taken for application of the ½ of 1% rate.

It is submitted that the amendatory legislation confesses the validity of Aero's objections to the text of the statute before amendment.

III. The Flat Ten Dollar Per Vehicle Tax Required by Section 3847.16, R. C. M., 1935, in so Far as it Applies to an Interstate Carrier, Violates the Commerce Clause of the U. S. Constitution.

A. *The Flat Ten Dollar Per Vehicle Tax Demanded By the Board Is Not Compensatory In That the Proceeds Are Not Appropriated For Highways Purposes.*

The Board of Railroad Commissioners of Montana seeks to impose a flat tax of ten dollars per vehicle, pursuant to Section 3847.16 of the Motor Carrier Act, R. C. M., 1935, on every motor vehicle operated by the Aero Transit Company over the Montana highways. Aero is exclusively an interstate carrier, and already pays truck registration fees, truck license fees and a gallonage gas tax on gasoline to the State of Montana. (Opinion of State Court, R. 194.) And an *ad valorem* tax (Sec. 1759, R. C. M. 1935, as amended by Ch. 72, Laws 1937.)

A state may impose upon motor vehicles using its highways exclusively in interstate commerce certain taxes if, and only if, the taxes can be said to be compensatory for the use of the highways. In the *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183 (1931), the Supreme Court held that tax imposed by Tennessee upon the privilege of operating a bus in interstate commerce was invalid because the tax was not imposed solely as compensation for the

use of highways or to defray the expense of regulating motor traffic:

> "While a State may not lay a tax on the privilege of engaging in interstate commerce . . . . it may impose . . . . a charge as compensation for the use of the public highways. . . . . The tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for the use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to use. . . . ., or by the express allocation of the proceeds of the tax to highway purposes. Brandeis, J., in *Interstate Transit, Inc.* v. *Lindsey*, pp. 185-186.

A State that levies a tax on an interstate carrier must show affirmatively that the tax is exacted as a highway compensation measure. Such a showing may be made by the "express allocation of the proceeds of the tax to highway purposes." In *Sprout* v. *City of South Bend*, 277 U. S. 163 (1928), a license fee imposed by a city ordinance of South Bend, Indiana, upon interstate buses was held invalid because there was no suggestion in the language of the ordinance that the proceeds were to be applied to the construction or maintenance of the city streets. In 1937 a California license fee on automobiles towed from without the State for sale was held invalid because the appellant did not show that the fees collected were used to meet the cost of highway construction or maintenance (*Ingels* v. *Morf*, 300 U. S. 290).

There is no express allocation of the proceeds of the flat ten dollar per vehicle tax demanded by the Board to highway purposes. The Montana statutes not only fail to show that the proceeds are used for highway maintenance, construction or repair, but they show, affirmatively, that the proceeds are used for purposes unrelated to high-

ways or the regulation of motor traffic. Section 3847.17 prescribes that the fees collected under the Act shall be placed to the credit of the motor carrier fund, and that fund is "available for the purpose of defraying the expenses of administration of this act, and the regulation of the businesses herein described" (Sec. 3847.17 R. C. M. 1935). The "availability" did not long endure. The history of the use made by the legislature of the motor carrier fund established in 1931 by the section quoted is set forth in Appendix 4. The money in the motor carrier fund is, in short, appropriated for carrying out all the duties of the Railroad and Public Service Commission. The duties of the Railroad and Public Service Commission, for which the proceeds are appropriated, include the supervision and regulation of thirty activities (Secs. 3879-3913, 3859-3878, 3913.1-3913.24, 3914-3946, 3848-3858, R. M. C., 1935), such as the regulation and supervision of railroads, public utilities, common carriers, pipe lines, and the manufacture or production of flour, bran and millfeed.

Even if all of the proceeds were allocated to the Board alone for defraying expenses incurred in the regulation of motor carriers only, the tax would not be compensatory if imposed on an interstate carrier. The expenses incurred by the Board in conducting hearings and regulating motor carriers are not increased by Aero's operations. Aero cannot be subjected to the discretionary powers of the Board, necessitating "a showing of public convenience and necessity" (Sec. 3847.23, R. C. M., 1935). The duties of the Board with respect to interstate carriers regarding the regulation of rates, fares, charges, accounts, service and safety operations (Sec. 3847.3) are superseded by the enactment of the Federal Motor Carrier Act, 1935, 49 U. S. C. Secs. 301-327, which vested the authority to regulate the rates, fares, charges (49 U. S. C., Sec. 316), ac-

counts, service and safety operations (49 U. S. C., Sec. 304) of interstate carriers in the Interstate Commerce Commission.

That the tax challenged is not laid as compensation for the use of the highways, is confirmed by contrasting Section 3847.17 and the appropriation bills set forth in Appendix No. 4 with those Montana statutes which admittedly provide for defraying the cost of constructing and maintaining highways. For example, Aero pays Montana registration fees ($22.50 per truck with 1½-2 ton capacity, and $37.50 per truck with 2-3 ton capacity), license fees and a gasoline tax (five cents per gallon purchased). By the express terms of Sections 1760(c), as amended by Ch. 200, Laws of Montana, 1945, the net license fees derived from the registration of motor vehicles are to be used for the construction, repair and maintenance of public highways, except State and Federal highways. By the terms of Sections 2381.2, 2381.7 and 2396.2, R. C. M., 1935, the proceeds of the 5¢ gallonage tax on gasoline are allocated to the State highway fund for the "construction, betterment and maintenance, etc., of the Federal highway system of highways. . . ." No appropriations are made to the State Highway Commission or to the State Highway Fund out of the General Fund of the State.

It is not difficult to see why the proceeds of the flat ten dollar per vehicle tax required by Section 3847.16 are not used for highway maintenance, because the money paid by Aero for the uncontested registration, license and gas taxes (totalling $2089.35 for 1939) average about 2⅓ to 2½ cents per mile, which stands high in comparison to the less than one cent per mile average throughout the rest of the United States (R. 60-61). It would seem by this comparison that Aero already pays sufficient compensatory taxes for the use of Montana's highways without the added imposition of the flat ten dollar per vehicle tax.

It is true that it was said in *Clark* v. *Poor*, 274 U. S. 554 (1927), on page 557, that the "use to which proceeds are put is not a matter which concerns the plaintiffs." The statement was merely *dictum*, however, because the proceeds of the tax there in question were actually appropriated in accordance with Sections 614-94 and 614-96, Page's Annotated Ohio General Code, 1926, which specifically prescribe that the proceeds are for the "maintenance and repair of public roads, highways and streets and for no other purpose, and shall not be subject to transfer to any other fund."

B. *The Flat Ten Dollar Per Vehicle Tax Demanded By the Board Is Not Compensating In That the Tax Bears No Reasonable Relation to the Use of the Highways for Which the Charge Is Made.*

Not only are the proceeds of the flat ten dollar per vehicle tax allocated to purposes other than highways, but also the tax bears no reasonable relation to the use of the highways for which the charge is made. Reasonable relationship to use may be shown by taxes such as a mileage tax directly proportioned to use, or taxes related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights. *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183, *supra*. In *McCarrol* v. *Dixie Greyhound Lines*, 309 U. S. 176 (1940), the Supreme Court held an Arkansas statute invalid which levied a tax on the gasoline in the tanks of motor carriers entering the State because the measure of the tax bore no fair relationship to use made of the highways. Also, in *Prouty* v. *Coyne*, 55 F. (2d) 289 (1932) a statute was held violative of the commerce clause because a fixed flat charge was made against

vehicles, graduated according to weight of the vehicles, but regardless of the mileage traveled or the tonnage carried.

Again it is helpful to compare the flat tax with the Montana taxes already paid by Aero. The registration fees are graduated according to weight (Section 1760 R. C. M. 1935, as amended by Ch. 200, Laws 1945), and the gas tax bears some relation to mileage, in that the amount of gas purchased in Montana is dependent upon the number of miles traveled, as is the case with any gallonage tax for gasoline for motor vehicles.

There is not even a remote relationship between the amount of the flat tax and the use Aero makes of the highways. Brandeis, J. in *Sprout* v. *City of South Bend, supra* (page 170), pointed out that such a flat tax cannot be said to be dependent upon the actual use made of the highways:

> "A flat tax, substantial in amount, and the same for buses plying the streets continuously in local service and for buses making, as do many interstate buses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways."

The statute exacting the flat tax makes no distinction between carriers engaged exclusively in interstate commerce and carriers engaged exclusively in intrastate commerce. Also there is no distinction made between carriers that operate at a regular schedule between fixed termini and carriers whose trips are irregular and infrequent. If Aero complies with Section 3878.16, it must pay, even though its trips over the Montana highways are occasional and infrequent, the same tax for each vehicle as those who may be constantly using the highways. As to those engaged in interstate commerce, the act must be held to be unconstitutional. *Prouty* v. *Coyne, supra*, p. 293.

C. *The Flat Ten Dollar Per Vehicle Tax Considered in the Light of State Taxes Imposed on Interstate Motor Carriers Which Have Been Upheld By the Supreme Court.*

In order to understand the burdensome nature of the flat tax, it is important to distinguish it from some of the State taxes imposed on interstate carriers which have been upheld by the Supreme Court of the United States. For example, in 1935 the Court upheld a twenty-five dollar per vehicle tax imposed by Georgia on Aero, *Aero Transit Co.* v. *Georgia Commission*, 295 U. S. 285 (1935). The tax in question was a registration tax similar to and less than the registration tax already paid Montana by Aero in accordance with Section 1760, R. C. M., 1935, as amended by Ch. 200, Laws 1945, or prior to amendment. Moreover, the funds of the Georgia registration tax are "paid to the State Highway Department for use in maintenance and repair of the highways," Section 18, of the Public Utilities Commission Act, Georgia Laws Ex. Session, 1931.

In *Morf* v. *Bingamen*, 298 U. S. 407 (1936), the Supreme Court upheld a New Mexico registration fee imposed on vehicles towed from out of the State for sale (the fee amounted to $7.50 for vehicles under own power, and $5.00 for vehicles towed, Chap. 56, p. 101, New Mexico Session Laws of 1935). The Court, citing *Clark* v. *Poor*, 274 U. S. 554, stated that it was not important if part of the fees collected were not devoted directly to highway maintenance. That statement cannot be used as support for the Montana flat tax, because the New Mexico tax was a registration fee similar to the registration fee already paid Montana by Aero, and part, at least, of the proceeds of the New Mexico registration fee were used for highway maintenance. A year after deciding *Morf* v. *Bingamen*, the Supreme Court held a similar registration fee imposed on towed vehicles

for sale invalid for the very reason that the fees collected were not used to meet the cost of highway construction or maintenance (*Ingels* v. *Morf*, 300 U. S. 290).

State taxes which impose burdens on interstate commerce violate the commerce clause and are void; *State* v. *Montana-Dakota Utilities*, 114 Mont. 161 (1943). The tax "cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for the use of the highways." *Lindsey* case, 283 U. S. 183. The flat ten dollar per vehicle tax required by Section 3847.16, R. C. M., 1935, is not compensatory because the proceeds are not allocated for highways purposes, and because the tax bears no reasonable relation to use made of the highways.

D. *The Flat Tax Must Be Paid Before an Interstate Operator Can Enter Montana and Is Therefore a Privilege Tax.*

The flat license tax of $10.00 per vehicle must be paid *"at the time"* the carrier is issued its certificate to operate, and *"annually thereafter,"* before it may enter upon the highways of Montana (Section 3847.16 R. C. M. 1935). It is, then, a flat tax imposed on the exercise of a privilege granted by the Federal Constitution, i.e., the very privilege of carrying on interstate commerce, the movement of the truck over the road.

But it is settled that,

> "A state may not exact a charge for the enjoyment of a right granted by the Federal Constitution."
> *Murdock* v. *Pennsylvania*, 319 U. S. 105, 113, *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 56-58.

> "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment."
> *Magnano Co.* v. *Hamilton*, 292 U. S. 40, 44-45.

While the commerce clause draws no distinction between license taxes, fixed sum taxes, and other kinds of taxes,

> "... that is no reason why 'this court should shut' its eyes to the nature of the tax and its distinctive influence."
>
> *Murdock* v. *Pennsylvania*, 319 U. S. 105, 113.

Under the Montana statute, the issuance and the continuance of a permit certificate, or license, is dependent on the payment of the $10.00 vehicle tax laid by Section 3847.16.

As the statute says:

> "(c) Upon the failure of any motor carrier to pay such compensation, *when due*, the Board may, in its discretion, revoke the carrier's certificate or privilege and no carrier whose certificate or privilege is so revoked shall again be authorized to conduct such business until such compensation shall be paid" (Par. (c) Section 3847.16 R.C.M. 1935).

Obviously, this is the law invoked by the Board in its complaint against Aero (R. 1-4).

Moreover, the statute continues:

> "All compensation, fees or charges, *imposed* and *accruing* under the provisions of this act, shall be a lien *upon all the property* of the motor carrier *used in its operations under this act; * * * shall attach at the time the tax is due;* and shall have the effect of an execution duly levied. . . ." (Par. (d) Section 3847.16 R.C.M. 1935). (All italics ours.)

"All property used in its operations under this act," applied to Aero can only mean every interstate vehicle entering Montana. Absent payment of the fee, the Sheriff of any county may seize the interstate vehicle and sell it (Section

9431, R.C.M. 1935). And this without the carrier having its day in court.

> "Interstate commerce can hardly survive in so hostile an atmosphere."
>
> *Best & Co.* v. *Maxwell*, 311 U. S. 454, 456.

And Montana has heretofore evinced hostility to interstate commerce in attempt to lay a gross tax on interstate facilities, which, however, was held invalid by this Court as to such facilities.

Cooney v. *Mountain States Tel. & Tel. Co.*, 294 U. S. 384.

The actual or the potential discrimination in fixed-sum license taxes condemns them.

Robbins v. *Shelby County*, 120 U. S. 489;
McGoldrick v. *Berwind-White Co.*, 309 U. S. 33, and the line of cases referred to therein.

The arbitrary imposition of tax lien reaching out to all of the property of the carrier used in its operations under the Montana Act—and any piece of equipment may be so used—giving the lien the effect of an execution issued, suggest a peculiarly provincial concept of interstate commerce by the State of Montana. A concept far removed from the attitude that a State must take under the view that payment of even a lawful tax may not be enforced by the exclusion of the taxpayer from interstate commerce.

Western Union Tel. Co. v. *Massachusetts*, 125 U. S. 350;
St. Louis & Southwestern R. R. Co. v. *Arkansas*, 235 U. S. 350.

Section 3847.16, R.C.M. 1935, attempts to close the road to interstate commerce within the meaning of—

Buck v. *Kuykendall, etc.*, 267 U. S. 307;
Bush & Sons v. *Maloy*, 267 U. S. 317.

IV. The Gross Operating Revenue Tax Required by Section 3847.27, in so Far as it Applies to an Interstate Carrier, Violates the Commerce Clause of the U. S. Constitution.

A. *The Tax Required by Section 3847.27 Is a Tax on Aero's Gross Operating Revenue.*

In addition to the uncontested license, registration, *ad valorem* and gasoline taxes and the challenged ten dollar per vehicle tax, the Board seeks to enforce the payment of a gross operating revenue tax required by Section 3847.27 of the Motor Carriers' Act. Sec. 3847.27 requires that every motor carrier holding a certificate of public convenience and necessity issued by the public service commission file every three months with the commission "a statement showing the gross operating revenue of such carrier for the preceding three months of operation, or portion thereof." The carrier must pay to the Board a fee of "one-half of one per cent of the amount of such gross operating revenue, provided that the minimum annual fee paid by each Class C carrier (which includes Aero) is fifteen dollars for each vehicle. Aero has no operating revenue other than that derived from interstate commerce. Consequently, any tax imposed on its gross revenue, whether on the basis of a percentage or a fixed minimum, is necessarily a tax imposed on revenue derived from interstate commerce.

The statute clearly includes the gross operating revenue of the carrier. Nothing less. That is emphasized by repetition of the tax base, *i.e.*, "gross operating revenue" without geographical limitation, or any other qualification.

B. *The Gross Operating Revenue Tax Cannot Apply to Interstate Carriers under the Federal Motor Carrier Act.*

1. The gross operating revenue tax applies to motor carriers holding a certificate of public convenience and necessity issued by the Montana "Public Service Commission."

The gross operating revenue tax applies to motor carriers holding certificates of public convenience and necessity issued by the Montana Public Service Commission (Sec. 3847.27). Although interstate carriers do not have to make a "*showing of public convenience and necessity,*" they may not operate over Montana highways without first having obtained the certificate or "permit" (Sections 3847.10 and 3847.23).

2. The Montana Public Service Commission can not require an interstate carrier to obtain a certificate of public convenience and necessity, because the Federal Motor Carrier Act, which conferred upon the Interstate Commerce Commission the exclusive power of issuing a certificate of public convenience and necessity, superseded State legislation.

Aero already operates under a certificate of public convenience and necessity issued by the Interstate Commerce Commission in accordance with the Federal Motor Carrier Act, 1935, 49 U.S.C., Sections 301-327 (R. 8—admitted by Board at R. 49). Aero could not engage in interstate commerce without having obtained the latter certificate (49 U.S.C. Sec. 306).

As far as counsel for appellant know, neither the Montana Supreme Court nor the Supreme Court of the United States has construed the Federal Motor Vehicle Act with respect to its bearing on State powers. Texas, however, has had considerable litigation involving the implications

of the Act. In *Railroad Commission of Texas* v. *Bates*, 108 S.W. (2d) 789 (1937), the Texas Civil Court of Appeals held that the Federal Motor Carrier Act deprived the State Railroad Commission of authority to require an interstate motor carrier to obtain a State certificate of public convenience and necessity, and in the absence of such certificate, to prevent the carrier from carrying on its business. The Civil Court of Appeals followed the Texas Supreme Court reasoning that:

> "Congress, having assumed jurisdiction over this class of litigation, such control is exclusive, and such act of Congress superseded State legislation." Sharp, J., in *Southwestern Greyhound Lines* v. *Railroad Commission*, 99 S.W. (2d) 263, 268 (1936).

It follows that the Montana Public Service Commission has been deprived, by the Federal Motor Carrier Act, of authority to require an interstate carrier to obtain a State certificate of public convenience and necessity. Therefore, the gross operating revenue tax cannot apply to interstate carriers.

And see: *Buck* v. *Kuykendall*, 267 U. S. 307;
Bush & Sons v. *Maloy*, 267 U. S. 317, decided prior to the Federal Motor Carrier Act.

C. *The Gross Operating Revenue Tax Is Neither Apportioned to the Volume of Business in Montana Nor Is It Compensatory.*

1. A State cannot tax the gross operating revenue of an interstate carrier unless the tax is apportioned to the volume of business in the State.

The gross operating revenue tax, since it applies to an exclusively interstate carrier, constitutes an undue burden on interstate commerce, and exposes an interstate carrier to a multiplication of State taxes. Such a tax is violative

of the commerce clause of the Constitution of the United States.

Those engaging in interstate commerce cannot be subjected to a tax levied on their gross receipts as such, *New Jersey Tel. Co.* v *Tax Board*, 280 U. S. 338 (1930). In 1939 the Supreme Court held that a Washington tax levied on one-half of one per cent of the gross receipts of a business of marketing fruit shipped in interstate commerce was invalid under the Constitution:

> "It is enough for present purposes that under the commerce clause . . . state taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state." Stone, J., in *Gwinn, White and Prince, Inc.* v. *Henneford*, 305 U. S. 434, 438-439 (1939).

The *Henneford* case, *supra*, describes discrimination against interstate commerce by the imposition of the "risk of a multiple burden to which local commerce is not exposed," and warns that "such a multiplication of state taxes, each measured by the volume of commerce, would reestablish the barriers to interstate trade which it was the object of the commerce clause to remove" (pp. 439-440). No other result could flow from approval by this Court of the Montana statute.

2. The fifteen dollar per vehicle minimum demanded by the Board is such that the tax is in effect a gross operating revenue tax not apportioned.

If it is true, as the Board claims in its effort to save the tax, that the Board is not seeking a percentage of Aero's gross operating revenue from all sources of its interstate business, it is equally true that the Board is not seeking

a percentage of Aero's gross operating revenue apportioned to the volume of its business in Montana. The Board asserts that it seeks to collect only the minimum annual fee of fifteen dollars for each vehicle (R. 63-68). The large disparity between the arbitrary figure demanded as a minimum fee and that amount which would represent a tax on Aero's business based on apportionment illustrates that the tax is in effect a gross receipts tax not apportioned. The minimum is merely a device for circumventing apportionment. For example, if apportioned to the load miles operated in Montana (estimated by using an everage income per mile figure based upon the probable load factor in Montana), the gross operating revenue for 1939 was approximately $11,961.00. Although the tax at one-half of one per cent of that figure is only $59.80, the Board is demanding $660.00 which is tax based on the fifteen-dollar minimum for that year. An even wider disparity is shown by comparing the figures for 1942. The revenue approximated $16,160.50, one-half of one per cent of which is $80.00, whereas the tax for that year on the basis of the minimum is $1,035.00 (R. 61-62).

The amounts demanded by the Board, therefore, bear no relation to a fair apportionment of Aero's business in Montana. Since the minimum amounts demanded are eleven to thirteen times greater than one-half of one per cent of the approximate gross operating revenue in Montana (R. 61-62), the tax is in effect measured by revenue derived from activities in commerce which extend beyond the territorial limits of Montana. The minimum, therefore, subjects Aero to the risk of a multiple burden in the same manner if not in the same degree as a tax on one-half of one per cent of the gross operating revenue of all of Aero's interstate business.

3. The language of Section 3847.27 is such that the tax is a gross operating revenue tax not apportioned.

The amount demanded by the Board is the arbitrary minimum, which precludes possible apportionment to Aero's business in Montana. The Board could, however, in accordance with the language of Section 3847.27—and it *must* if it is obedient to the plain language of the statute—lay the tax on Aero's entire gross operating revenue. *Section 3847.27 makes no mention of apportionment.* In 1932, a similar tax imposed upon a contract carrier *was treated in accordance with the language of the statute:*

> "The statute might have been drawn so as to reach only the revenue derived from operators within South Carolina, but it was not so drawn, and if applied at all must be applied in accordance with its language . . . the act therefore constitutes a direct burden upon interstate commerce." Cochran, J., in *Nutt* v. *Ellerbe*, 56 F. (2d) 1058, 1064 (1932).

The fact that the statute neither prescribes nor suggests any formula for apportioning the tax indicates that there is no intent implicit in the statute to apportion the tax. The unapportioned gross operating tax is invalid.

Case of the State Freight Tax (1849) 15 Wall. 232;
Fargo v. *Michigan* (1887) 121 U. S. 230;
Philadelphia & Southern Steamship Co. v. *Pennsylvania* (1887) 122 U. S. 326;
Leloup v. *Port of Mobile* (1888) 127 U. S. 640;
Ratterman v. *Western Union Tel. Co.* (1888) 127 U. S. 411;
Western Union Tel. Co. v. *Alabama* (1889) 132 U. S. 472;
Galveston, H. & S. A. Ry. v. *Texas* (1908) 210 U. S. 217;
Meyer v. *Wells Fargo & Co.* (1912) 223 U. S. 298;

New Jersey Bell Tel. Co. v. *State Board of Taxes*, (1930) 280 U. S. 338;

Fisher's Blend Station, Inc. v. *State Tax Commission* (1936) 297 U. S. 650;

Puget Sound Stevedoring Co. v. *State Tax Commission* (1937) 302 U. S. 90.

In commenting on the last case cited, Powell says:

> "Hence the immunity of transportation receipts would seem to follow a fortiori from the protection here given to the returns from loading and unloading" (LX Harvard Law Review, No. 5, 748).

He was referring, of course, to immunity from unapportioned gross revenue taxes on interstate commerce.

Joseph v. *Carter & Weekes*, — U. S. —, No. 29, October Term, 1946 (and No. 30, its companion);

Freeman, Trustee, v. *Hewit*, — U. S. —, No. 3, October Term, 1946.

Even an admeasured or apportioned license tax on a corporation engaged exclusively in interstate commerce may be invalid. And Aero has no other engagement.

Cheney Brothers Co. v. *Massachusetts*, 246 U. S. 147 (1918);

Alpha Portland Cement Co. v. *Massachusetts*, 268 U. S. 203 (1925)

Fargo v. *Michigan*, 121 U. S. 230;

Puget Sound Stevedoring Co. v. *Tax Commission*, 302 U. S. 90;

Joseph v. *Carter & Weekes*, No. 29, October Term, 1946.

The imposition of a gross revenue tax counsels closer examination into the realities. Such a tax "affects each transaction in proportion to its magnitude, irrespective of whether it is profitable or not, and may be sufficient to make

the difference between profit and loss," and hence break down intrastate as well as interstate commerce.

U. S. Glue Co. v. *Oak Creek*, 247 U. S. 321, 329 (1918).

If we look at Aero's operations from the standpoint of *sales of service*, unapportioned gross revenue taxes are equally obnoxious to the Commerce Clause. Aero sells a service, i.e., physical transport of goods from a point in one State to a point in another State. It is a motor carter, a vendor of interstate transport, offering to sell its services to anyone who desires to move goods from one State to another among any of the forty-eight States, and who will pay the tariff rates. Its sale contract is initiated when it picks up a cargo from consignor; its sale contract is performed when it delivers the cargo to consignee. Consignor and consignee may be different persons or the same persons. The service purchased is the continuous and speedy movement of the cargo from one State to the other, absent essential traffic delays and supervening accidents. Montana may not reach out and impose a tax on the sale of services not performed in Montana—and that is just what Montana does when it attempts to tax the dollars earned in Massachusetts or North Dakota by draining them into its gross revenue scheme.

Adams Mfg. Co. v. *Storen*, 304 U. S. 307 (1938);

Gwin, White & Prince, Inc. v. *Henneford*, 305 U. S. 434 (1939);

Freeman, Trustee, v. *Hewit*, — U. S. —, No. 3, October Term, 1946.

The event upon which the tax is conditioned is a continuous service, a continuous movement (save for stops for fuel and rest for drivers) from State to State over the highways of the country. If Montana can lay a tax on

Aero's gross operating expenses so can every State along the route.

Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250.

Similar taxes could be imposed by each State through which the commerce passes, i.e. Massachusetts can levy on the earnings from highway mileage in every State from Boston to Helena; North Dakota may do the same, each State along the route reaching for the dollars arising from the other State's facilities. In such a situation it is of no moment that the same tax is laid on intrastate commerce within Montana by that State. Aero has no intrastate business in any State. Every one of the forty-eight may appropriate some part of Aero's revenues for Montana's mileage and the mileage in every other State. This is the vice this Court must defeat if interstate commerce is to survive.

McGoldrick v. *Berwind-White Co.*, 309 U. S. 33, at 45 n. 2, 48.

"But that, for the time being, only one state (i.e. Montana) has taxed, is irrelevant."

Freeman, Trustee v. *Hewit*, — U. S. —, No. 3, October Term, at page 7 of printed opinion.

Montana may not dismember the continuous event or act of transport on any theory of taxing Aero for the consignor's delivery of goods to the carrier in Montana, or receipt by the consignee in Montana.

Bacon & Sons v. *Martin*, 305 U. S. 380;

Dep't. of Treasury v. *Wood Preserving Co.*, 313 U. S. 62.

Transportation by land, as well as by water, is impossible without loading and unloading. The State "incidents" of consigning and delivering to the interstate carrier begin the commerce and the acts of receipting for, and receiving,

the load or cargo, terminate it; but they are indispensable events in interstate commerce, and in the sale of interstate services.

Puget Sound Stevedoring Company v. *Tax Commission*, 302 U. S. 90;

Joseph, Comptroller of City of New York v. *Carter & Weekes*, — U. S. —; No. 29, October Term, 1946 (and No. 30, its companion);

By way of contrast:

Coverdale v. *Pipe Line Co.*, 303 U. S. 604, 609;
Southern Pacific v. *Gallagher*, 306 U. S. 167, 178;
Richfield Oil Corp. v. *State Bank*, 329 U. S. 69.

And see:

Overnight Motor Co. v. *Missel*, 316 U. S. 572;
Levinson v. *Spector Motor Service*, — U. S. —, No. 22, October Term, 1946.

4. The tax is not compensatory.

The proceeds of the gross operating revenue tax are handled in the same way as the proceeds of the ten dollar per vehicle tax. Section 3847.28, R. C. M., 1935, allocates the proceeds to the motor vehicle fund, which is appropriated for the various unrelated purposes set forth in Appendix No. 4 of this brief. Although Class A and Class B carriers pay a minimum of thirty dollars per vehicle, there is not only no reasonable relation, but no relation to use made of the highways. There is, in fact, no motor vehicle fund. The State has abandoned the pretense of relation to highway use by seizing all moneys for the general fund (Appendix No. 4).

The gross operating revenue tax required by Section 3847.47 is therefore invalid under the Commerce Clause of the Constitution of the United States because it is not ap-

portioned to the volume of business in Montana. (See Division VI of this Brief, at page 77.) The attempt at apportionment made by the legislative assembly in 1947 (Ch. 73, Laws of Montana, 1947) some twelve years after Section 3847.27 was enacted, is merely an expression of belated hindsight.

V. The Montana Taxes Are Not "In Lieu" Taxes

There is no room to argue that either of the taxes are in lieu of *ad valorem* taxes on Aero's trucks. While appellees have not suggested that either of the taxes can be sustained as a method of arriving at the fair measure of a tax substituted for local property taxes (within the meaning of the doctrine stated in *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450, and *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335), their repetition of the generality that "interstate commerce must pay its way," their invention of a tax base and their further attempt to sever the $15.00 minimum from the gross revenue statute suggests that they may put forward such a proposal. They do complain that Aero "seeks to use the public highways of Montana for pecuniary gain without contributing its share of fees for the construction, maintenance, operation and regulation of the public highways" of Montana (R. 3). It is not tenable for the sufficient reason that (a) "*before*" any truck owned by a resident of Montana or any truck owned by a non-resident of Montana (Section 1759 R. C. M. 1935 as amended by Chapter 72, Laws of Montana, 1937), or any "foreign licensed motor vehicle" may be operated on the highways of Montana for hire, or "*before*" the owner of the foreign licensed vehicle "uses" the vehicle "in gainful occupation or business enterprise" in Montana, such person must register the vehicle, pay the registration fees, receive and display the license plates (Section 1760.7, R. C. M. 1935, as amended by Ch. 296, Laws of Montana, 1947) and (b) at

the time of *applying for registration, submit the application for registration to the county assessor for assessment of the vehicle and, in the words of the applicable statute* (Section 1759, R. C. M. 1935, as amended by Section 1 of Chapter 72, Laws 1937) the applicant shall—

> ". . . upon the filing of said application, (1) pay to the county treasurer the registration fee, as provided in Section 1760 Revised Codes of Montana, 1935, *and shall also at such time* (2) *pay the taxes assessed against said motor vehicle for the current year of registration* (unless the same shall have been theretofore paid for said year) *before the application for registration or re-registration may be accepted by the county treasurer.* The county treasurer is hereby empowered to make full and complete investigation of the tax status of said vehicle and any applicant for registration or re-registration must submit proof with respect thereto from the tax records of the proper county at the request of the county treasurer; provided, that nothing herein shall be deemed to conflict with the provisions of Section 1756.6 Revised Codes of Montana, 1935, and the provisions hereof shall be construed in connection therewith." (Laws 1937, pp. 124-125)

Thereafter, the county treasurer distributes the receipts from the registration fees "in relative proportions required by the levies for State, county, school district and municipal purposes in the same manner as other personal property taxes are distributed" (Section 1759.3 R. C. M. 1935, as amended by Section 1 of Ch. 200, Laws of Montana, 1945).

In addition, the State has set up a special registration procedure for the owners of "foreign" motor vehicles, under the jurisdiction of the sheriff "at the first county seat entered" (Section 1760.2, R. C. M. 1935).

By these statutes, the "foreigner" is placed on the same footing as the local trucker. Hence, there is no ground for asserting that either the flat vehicle tax or the gross revenue

tax is in lieu of *ad valorem* taxes which, except for them, would be paid only by the intrastate operator. The "foreign" owner must pay the same *ad valorem* tax as the resident of Montana pays, vehicle for vehicle, and before his vehicle may lawfully turn a wheel on a highway in Montana. Indeed, the payment of the *ad valorem* taxes before operation of the vehicle is for the very privilege of operating the vehicle in interstate commerce (Sections 1759 and 1760.7, R. C. M. 1935).

VI. The Doctrine of "Compensation for Use of the Highways" Does Not Remove the Limitations on the Power of the States to Regulate or Affect Interstate Commerce.

The Board attempts to make much of the doctrine that the State may exact compensation "for the privilege of using its highways." It does not always state the doctrine in terms of "compensation," for example:

> "It is well settled that a state may impose upon vehicles used exclusively for interstate transportation a fair and reasonable tax for the privilege of using its highways for that purpose," *i.e.*, interstate transportation (Board's Statement Opposing Jurisdiction, p. 7).

That indicates that the Board feels the interstate carrier must pay for the interstate privilege, not compensate for the use of facilities. This is the very thing condemned by this Court in *Buck* v. *Kuykendall*, 267 U. S. 307. This is, in reality, the same view the State of Montana took in *Cooney* v. *Mountain States Tel. & Tel. Co.*, 294 U. S. 384. Such view was rejected by this court in the *Cooney* case, and before in *Leloup* v. *Port of Mobile*, 127 U. S. 640, *Crutcher* v. *Kentucky*, 141 U. S. 47, *Bowman* v. *Continental Oil*, 256 U. S. 642; and since, in *Murdock* v. *Pennsylvania*, 319 U. S. 105, *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S.

90, and in *Joseph* v. *Carter & Weekes*, No. 29, October Term, 1946. And such view was excluded by the passage of the Federal Motor Carrier Act (Title 49 U. S. C. A. 301).

But, conceding that the Board is thinking of "compensation," the phrase serves no more useful purpose than other phrases used to tag permissible action, *i.e.*, "Local incident," "direct," "measure of value of local franchise," "in lieu of tax," etc. There is not the slightest suggestion in the cases cited by the Board that the compensation doctrine defeats either the principle

(a) that taxes on *unapportioned* gross revenues of *transportation companies* are invalid, (*Philadelphia & Southern S. Co.* v. *Pennsylvania*, 122 U. S. 326; *Ratterman* v. *Western Union Tel. Co.*, 127 U. S. 411; *Western Union Tel. Co.* v. *Alabama*, 132 U. S. 472; *Galveston, H & S. A. Ry. Co.* v. *Texas*, 210 U. S. 217; *Meyer* v. *Wells, Fargo & Co.* 223 U. S. 298), or,

(b) the principle that taxes on gross revenues of transportation companies even where admeasured or related to local activities, may be equally invalid (*Fargo* v. *Michigan*, 121 U. S. 230; *New Jersey Bell Tel. Co.* v. *Board*, 280 U. S. 217; *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90; *Joseph* v. *Carter & Weekes*, No. 29, October Term, 1946).

In other words, the fact that the use of state highways is involved, makes no difference under the Federal Constitution. A definite, reasonable relationship between tax and use must affirmatively appear; otherwise the interstate carrier is put in peril of arbitrary exaction, and the national commerce in jeopardy. This Court, whether encouraged by the confidence exhibited by Congress in the court's interpretations of the Commerce Clause (*Joseph* v. *Carter & Weekes*, No. 29, October Term, 1946); or otherwise, will not imperil interstate commerce on highways any more than on the

desks and wires of brokers (*Freeman* v. *Hewit*, No. 3, October Term, 1946). Indeed, transport via highway was originally, and remains today, the first concept of "interstate commerce" as that phrase is used and understood by our people. Absent transport by road or rail, interstate commerce would, in truth, be an airy phrase.

Before examining the limitations on the "compensation" doctrine, let us look, briefly, at the provisions made by the State for highways. There is much loose talk about highways "owned" by the state. (There is also much loose thinking which assimilates state boundary lines to "gates," "ports of entry," etc. Indeed, respondent is so imbued with the compartmental conception of the States in the area of national commerce, that it overlooks the fact that its attempts to stop the commerce, actually to arrest it, to impound Aero's vehicles (Par. "C" of Aero's Cross-Complaint, R. 12, admitted by Board's Answer, Par. I, R. 49) would soon injure intrastate commerce in Montana. It stands admitted that Aero moves over the highways of the United States, household goods and office furniture *incident only to a* change of residence of the owner (Par. "A" of Aero's Cross-Complaint, R. 8, admitted by Answer of Board, at R. 49). Without their household goods or their office equipment, the personal and business activities of the owners would be largely defeated, if not suppressed. The right of our citizens freely to move about and follow their lawful pursuits would be of little value, and the 5th and 14th Amendments of historical interest only (*Crandall* v. *Nevada*, 6 Wall. 35).

The United States of America has been a builder of highways in Montana from the days of the Mullan Trail which connected the headwaters of the Missouri River with the headwaters of the Columbia River (10 U. S. Stats. At Large, 603, Ch. LV, pp. 603-604, Act approved February 6, 1855; 11 U. S. Stats. At Large, 434, Ch. LXXXIII, pp.

431-435; 12 U. S. Stats. At Large, 19, Ch. LVII, p. 19; 1 Sanders History Montana, 279) until the present day when its contributions are greater than ever. By Chapter 10, Laws Extra Session, 1921, pp. 752 760, the State expressly assented to the "Act of Congress approved July 11, 1916," known as the Federal Aid Road Act (*Idem.* Sec. 9, p. 756), has adhered thereto for more than twenty-five years, and currently continues the compact (Sec. 1791, R. C. M. 1935). Montana devotes its state highway fund accruing from the gallonage tax on gasoline to the performance of its obligations under the compact (Sec. 2396.2 , R. C. M. 1935, as amended by Chapter 264, Session Laws, 1947).

By the terms of the Federal Aid Act, now called the "Federal Highway Act" (Title 23 U. S. C. A., Secs. 1-41) the state submits road projects to the Secretary of Agriculture, for "primary or interstate or secondary or inter-county highways," and upon approval by him and certification of such approval, the Secretary of the Treasury sets aside the share of the United States, "not exceeding 50 per centum of the total estimated cost thereof," plus additional percentages in a state (such as Montana) containing unappropriated public lands and non-taxable Indian lands (Title 23, U. S. C. A. Sec. 12).

Undoubtedly, Montana may, in a proper case, tax the interstate activity by way of compensation for use of such highways, notwithstanding the Federal government's equal or greater contributions to the facilities and its regulation and supervision of such highways (Title 23, U. S. C. A. Secs. 10, 13 and 19). But the notion that Montana is a sole proprietor of such highways, that Montana alone has borne the burden of their construction, should not lurk in judicial thought during any consideration of "compensation" in this case.

The Federal government's contributions to "state high-

ways" are in aid of the citizens of every state, in aid of Aero as a Kentucky corporation, quite as much as they are in aid of the citizens of Montana and the corporations domiciled therein. The Federal government's contributions are in aid of that national unity which was the principal purpose of the Constitution and without which Montana would enjoy little prosperity.

Respondents' narrow conceptions of state ownership of the "State highways" do not alert us to the existence of the substantial Federal contributions to, and interest in, the very highways, the use of which is denied to Aero until after it pays the taxes demanded. The Congress has not, by the Motor Carrier Act of 1935, as amended (Title 49 U. S. C. A. Sec. 301) relinquished any of its power to protect interstate commerce or removed from the jurisdiction of this court its plenary right to construe the respective powers of Federal and State governments (Title 49 U. S. C. A. Sec. 302) as it has been accustomed to do. On the contrary, the Congress has, by that Act, made clear that the interstate carrier may enjoy his certificate of convenience and necessity in interstate transport without begging the States for such privilege, even though it must pay its way.

The interstate highways in the nation are not multiple deck bridges, with one deck for intrastate traffic and another deck for interstate traffic. There is one continuous roadbed for all to use, in whatever commerce they may be engaged. And the interstate operator has fully as much right to move his vehicle thereon as the local operator, in the presence of the complementary legislation by the Congress and the assenting States.

We continue, then, under the duty to examine and apply the decisions of this Court in the highway compensation doctrine. While the Board in its complaint (R. 3) charged that Aero was not contributing its share of taxes for the construction, maintenance, operation and regulation of the

public highways of the State," it abandoned that charge, and now finally asserts that Aero is not contributing taxes "in consideration of the use of the highways of the State" (Board's Statement Opposing Jurisdiction, pp. 7 and 8). Confronted with the fact that none of the fees were actually devoted to highway maintenance or construction, and that the receipts of both taxes go to the general fund of the State, the Board took refuge in the fact that the statutes levying both taxes did assert in words that they were "in consideration of the use of the highways of this state," and argue that whether the monies were actually expended for highway purposes, is immaterial. The statement that a tax is laid in consideration of use merely provokes inquiry as to the relation between tax and use. In short, the Board's demand on Aero may be paraphrased: "You use the State's highways. You must pay in advance for that use. Pay the Board for the general fund of the State, $10.00 per truck per year. In addition, pay into the same fund ½ of 1% of your gross operating revenues every quarter during the year. The State is not obliged to account to you for what it does with its general fund. It is enough that you use its highways." This is merely to say, "If you pay the tax, you may use the highways." But such conditional permission does not establish any relation between tax and use; nor does the mention of $10.00 per vehicle or a percentage of system revenues. They are both meaningless because "use" is not measurable by them in *vacuo*. Presumptions of legislative legitimacy are of no avail when the very statutes in question extinguish them *by ignoring relationship between tax and use*. The doctrine of compensation for use is not observed by merely stating *a fee for a use*.

> ". . . the mere fact that the tax falls upon one who uses the highway is not enough to give it presumptive validity."
>
> *Interstate Transit, Inc.*, v. *Lindsey*, 283 U. S. 183.

As we view the decisions of this Court on the subject of the right of the State to lay a tax on interstate commerce, its incidents, local activities, or its fruits, there is consistency in majority and minority view in the steady attempt to relate tax and presence in the State, tax and protection afforded by the State, tax and burden to the State, tax and use of State facilities. Montana failed to do this in both the statutes before this Court. There is not a single decision of this Court in the area of compensation for highway use that warrants the thought that reasonably direct and reasonably fair relationship between tax and use *must affirmatively* appear.

Cases Decided Prior to Federal Motor Carrier Act

In *Hendrick* v. *Maryland* (1915) 235 U. S. 610, the Court had before it Ch. 207 of the Laws of Maryland, 1910, prescribing a registration fee, graduated according to motor horse power, for operating motor vehicles over the highways. In upholding the fee as a valid exercise of the police power, over objections of a resident of the District of Columbia who failed to show compliance with the Acts of Congress providing for registration of motor vehicles in the District, or that he applied for an identifying tag in Maryland giving him limited free use of the highways in Maryland, the Court related amount of charge and method of collection to the standards of reasonableness, uniformity, fairness and practicality. The Maryland statute was not shown to fail these tests and hence constituted no burden on interstate commerce. Any excess of fees over cost of regulation was *applied to the maintenance of improved roads.*

In *Kane* v. *New Jersey*, (1916) 242 U. S. 160, Chapter 113, Laws of New Jersey, 1906, p. 177, as amended by Chapter 304, Laws of New Jersey, 1908, another motor vehicle regis-

tration act providing license fees graduated according to horse power was attacked by a resident of New York who had been licensed as a driver under the laws of both New York and New Jersey and who had registered his car in New York, but not in New Jersey. While enroute from New York to Pennsylvania, Kane was arrested in New Jersey because he had not registered his car in that State. He challenged on grounds that the New York statute violated the Commerce Clause and the Fourteenth Amendment. His challenge was rejected on the ground that the State's right "is properly exercised in imposing a license fee graduated according to the horse power of the engine" (242 U. S. 160, 167) and any excess in fees over expenses was *applied to the maintenance of improved roads*. Tax and use were directly related.

In *Clark* v. *Poor*, (1927) 274 U. S. 554, interstate operators complained of the Ohio Motor Transportation Act of 1923, as amended, (Ohio General Code, Secs. 614-84 to 614-102) on the very broad ground that they were not subject to regulation by the State, including payment of a tax graduated according to the number and capacity of the vehicles used (Secs. 614-87, 614-94). *Payment of a tax was for the maintenance and repair of the highways* and for the administration of the Act (Sec. 614-94). There the statute itself directly related tax to use. There was no reach for extraterritorial revenues.

In *Interstate Busses Corp.* v. *Blodgett* (1928), 276 U. S. 245, a Connecticut corporation engaged exclusively in interstate commerce, claimed that Ch. 254, Connecticut Public Acts, 1925, imposed an unconstitutional burden on interstate commerce because as to it alone, the statute prescribed an excise tax of one cent for each mile of highway traversed by any motor vehicle in interstate commerce. Eighty per-cent of the cost of construction and maintenance of Con-

necticut's highways was collected from registration fees, drivers' licenses and taxes on sales of gasoline. Intrastate operators paid a 3% gross receipts tax, less local taxes on real and personal property. By the very terms of the statute (Part II, Sec. 4) the proceeds are to be applied to the maintenance of the public highways in Connecticut. This Court found that plaintiff failed to show "*that the aggregate charge bears no reasonable relation to the privilege granted.*" Obviously Connecticut's legislators related the interstate tax to use by the mileage device. Montana's legislators refused to do this at any time from 1931 to 1947.

In *Sprout* v. *South Bend* (1928), 277 U. S. 163, Sprout, who operated a bus between South Bend, Indiana, and Niles, Michigan, refused to pay the license fee prescribed by the City of South Bend, Indiana, for operation of busses over its streets. By the terms of the municipal ordinance, the fee varied with the seating capacity of the bus. The fees were not applied to expense of regulation or for construction or maintenance of the city streets. This Court held the ordinance void. There was no showing of relationship between tax and enforcement or that the tax had been designed as a measure of the cost or value of the use of the highways.

In *Carley & Hamilton* v. *Snook*, (1930) 281 U. S. 66, *intrastate* operators objected to Sections 77(b) and (c) of the Motor Vehicle Act of California, 1923 California Statutes, Chapter 266, as amended by 1927 California Statutes, Ch. 844, prescribing registration fees on an elaborate scheme, including factors of weight of vehicle, load, tire equipment, etc. Violation of the Fourteenth Amendment was charged on the ground of multiple taxes. After deductions for the support of enforcement, the statute required the fees to be paid one-half to counties *for construction and maintenance of roads; one-half for maintenance of State roads.* Hence

there was a relation between tax and use. In passing, this Court pointed out that in cases involving *interstate commerce*, it "may inquire whether the tax bears some reasonable relation to the use of the State facilities by the carrier."

In *Interstate Transit, Inc.* v. *Lindsey*, (1930) 283 U. S. 183, an Ohio corporation operating exclusively in interstate commerce complained that Chapter 89, Laws of Tennessee, 1927, imposing a tax graduated according to seating capacity of busses, violated the Commerce Clause. The Tennessee Act, like the Montana Statutes, sent the proceeds of the taxes to the General Fund of the State (283 U. S. 183, 188). And in Tennessee, as in Montana, State highways were constructed and maintained by the State Highway Commission out of the State Highway Fund. These conditions moved this Court to declare that the tax was not exacted for construction and maintenance of highways but merely as a privilege tax for carrying on interstate business. This Court further found that the seating capacity device proportioned the tax solely to earning capacity of the vehicle, and said: "• • • there is here no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses."

In *Aero Transit Co.* v. *Georgia Comm.* (1934) 295 U. S. 285, the Motor Carrier Act of Georgia, 1931 (Georgia Laws, Ex. Session 1931, p. 99) was attacked by an interstate operator who objected to a registration and license fee of $25.00 for every vehicle operated. The fee was payable "as soon as the certificate is issued," and annually thereafter as long as the certificate is in force (Sec. 18). The same section required the fees to be paid into the motor vehicle fund, from which all costs of enforcement and administration were to be paid, and any excess over those requirements

paid to the State Highway Department "for use in maintenance and repair of the highways." This Court thought the fee moderate in amount and emphasized that "*it goes into a fund for the upkeep of highways which carriers must use in the doing of their business.*"

There was thus a direct relationship between fee and facility.

Cases Decided After Federal Motor Carrier Act

In *Morf* v. *Bingaman* (1936) 298 U. S. 407, this Court reviewed Ch. 56, Laws of New Mexico, 1935, providing flat fees for permits for transportation of motor vehicles on their own wheels for sale or offer for sale, whether driven singly or in processions or caravans. This mode of transport was shown to be singularly burdensome both from wear and tear on highways and policing traffic. The business was shown to be unusual, in a distinct class and of considerable magnitude. Chapter 56, Laws 1933, was an amendment of Ch. 139, Laws of New Mexico, 1933, which, in turn, amended Ch. 119, Laws of New Mexico, 1929. The proceeds were divided after deducting 6% for enforcement, between the State Road Fund, County Road Funds, State General Fund and County, City and School Districts (Ch. 119, Laws of New Mexico, 1929, p. 266). This Court found the tax "*not on the use of highways,*" but for the purpose of enabling the State to police such extraordinary traffic. The processional cars did not receive State licenses or license plates.

In *Ingels* v. *Morf* (1937), 300 U. S. 290, this Court annulled the California Caravan Act (Cal. Stat. 1935, C. 402) imposing a fee of $15.00 on each vehicle moving in caravan under a special permit. The Court pointed out that by explicit declaration of the act, the proceeds from the fees were to reimburse the State Treasury for the cost of polic-

ing the traffic, concluded that this negatived any tax-highway use relation, and found the fee excessive for policing purposes. In the same year, the California Legislature substituted a new statute which was upheld in *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583.

In *Dixie Ohio Co.* v. *Commission* (1939), 306 U. S. 72, an interstate carrier complained of the Georgia Maintenance Tax Act (No. 376, Laws of Georgia, 1937, p. 155) which set up an elaborate system of taxes on all classes of motor vehicles, graduated as to vehicles carrying property, on a weight basis. Vehicles for which the taxes were paid were required to affix and carry a "Maintenance Tag" and all the moneys derived from the sales of the tags were allocated to the State Highway Department for expenditure on roads (Sec. 11, p. 166). This Court said the language of the act disclosed the intention of the State to require compensation for road use. No proof was made showing that the fee was unreasonable in amount. Tax and use of roads were related on the basis of maintenance. Whether the operation used the very stretches of road benefitted, was immaterial.

McCarroll v. *Dixie Lines* (1940), 309 U. S. 176, is the last case from this Court which has come to our attention. There, an operator of an interstate passenger bus resisted application of an Arkansas Statute making applicable the general excise tax of 6½ cents per gallon of motor fuel to every company driving into the state a motor vehicle carrying over twenty gallons of gasoline in its tank. This Court found that a fair charge for use of the highways could have no reasonable relation to the reserve gasoline in tank. The concurring opinion stressed that it "*must appear on the face of the statute or be demonstrable that the tax as laid is measured by, or has some fair relationship to the use of the highways for which the tax is laid.*" The

tax was used exclusively for highway purposes. But even that general relationship did not give the tax the necessary admeasurement. The concurring opinion said:

> "In no case does it appear that the amount of taxed gasoline has any relation to the size or weight of vehicles. The last expression from this Court requires not only relationship between tax and use but admeasured relationship between tax and use."

VII. The Judgment of the Supreme Court of Montana, as to Both Taxes, Must Be Reversed

1. The Montana Supreme Court determined that both the $10.00 per vehicle tax and the ½ of 1% gross revenue tax apply to Aero Mayflower Transit Co., operating exclusively in interstate commerce. The Court rested its decision on its statement,—

> "The revenue collected is devoted to the building, repairing and policing of such highways, and that which the State furnishes is an aid, not a burden to interstate commerce" (R. 118-119).

Since this statement is completely erroneous in fact, the opinion of the State court fails for want of its asserted premise.

2. The substitute or alternative premise for the State court's opinion offered by the Board, i.e., reiteration of the statutory language that each tax is imposed "in consideration of the use of the public highways of this State" disappears in the presence of the action of the Legislative Assembly of Montana in appropriating the proceeds from the start to purposes foreign to highway use and finally seizing the fees for the General Fund of the State.

3. The statutory statement of consideration is without even presumptive force in the presence of the Legislature's express rebuttal of it.

4. In any event, this Court has consistently insisted that those who seek, by such self serving statutory announcements, to lay a tax on a transportation company exclusively engaged in interstate commerce—an area that may be reserved from State action entirely—affirmatively demonstrate that the exaction is not for the privilege of doing interstate commerce, that it is fair, that it is non-discriminatory, and that the tax, assertedly laid for use of highways, bear an actual relationship to use.

5. In the presence of these principles, both taxes here asserted are void because,—

(1) the flat $10.00 per vehicle tax is conceived in hostility to interstate commerce in that it conditions the right to carry on such commerce in Montana on a "permit" to be issued by the Board on condition of payment of the tax initially in advance and annually in advance for successive annual periods; in that it affirmatively appears that the legislature has prevented use of the proceeds not only for highway construction and maintenance but for enforcement of the Motor Carrier Act, as well; in that the provision for liens and executions on interstate vehicles imperil interstate commerce every hour and every mile in Montana; and the attempt of the Board in this action physically to stop interstate commerce, and the Montana Court to enjoin the operation, demonstrate the hostile intent of the law; and that the flat tax bears no relation to interstate use;

(2) the gross revenue tax was manifestly enacted without care in the light of the provision confiding its enforcement to the Public Service Commission instead of the Board of Railroad Commissioners; in that it affirmatively appears that the legislature has negatived any presumption of use of proceeds for highway purposes or administrative enforcement; in that it is emphatically and repeatedly ad-

dressed to all the gross operating revenues of the carrier; in that the "construction" of the Supreme Court of Montana that the tax is laid on some proportion of interstate revenues derived by an unknown formula is rejected by the very words of the statute; in that there is neither apportionment, nor rule for apportionment; in that it is aggressively extra-territorial in operation, and subjects the interstate carrier to multiple burdens not borne by the intrastate carrier;

(3) that the evident carelessness in legislative draftsmanship of both taxes, in the presence of a myriad of tried legislative precedents logically leads to the conclusion that the law makers were not mindful of the limitations on State power, and interstate commerce must, at a minimum, be protected from the uncertainties, and the risks consequent on the Board's offer to make the gross revenue statute valid by ignoring its invalidity.

Conclusion

It is submitted that both statutory taxes are void for conflict with the Constitution of the United States, as alleged in the Cross-Complaint of Aero, and that the judgment of the Supreme Court of Montana must be reversed, with directions to enter judgment for appellant.

Edmond G. Toomey,
Emmet S. Huggins,
Attorneys for Appellant.

Helena, Montana.
September 13th, 1947.

ADMISSION OF SERVICE

Service of the foregoing Brief of Appellant, and receipt of a true copy thereof is hereby admitted at Helena, Montana, this 15th day of September, 1947.

R. V. BOTTOMLY, ESB,
Attorney General of the State of Montana,
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Attorneys for Appellees.

APPENDIX NO. 1

The "Flat" $10.00 Per Vehicle Tax Statute

(Originally enacted as Sections 16 and 17 of Chapter 184, Laws of Montana, 1931; now found as Sections 3847.16 and 3847.17 Revised Codes of Montana, 1935, at pages 688 and 689 of Volume 2 (Political Code) Revised Codes of Montana, 1935).

"3847.16. *Annual fee for motor carriers—fee for seasonal operators—compliance required of motor carriers operating in more than one state—revocation of certificate for failure to pay fees—lien of fees and charges.*

(a) In addition to all of the licenses, fees or taxes imposed upon motor vehicles in this state, and in consideration of the use of the public highways of this state, every motor carrier, as defined in this act, shall, at the time of the issuance of a certificate and annually thereafter, on or between the first day of July and the fifteenth day of July, of each calendar year, pay to the board of railroad commissioners of the state of Montana the sum of ten dollars ($10.00), for every motor vehicle operated by the carrier over or upon the public highways of this state.

Provided, that a motor carrier engaged in seasonal operations only, where its said operations do not extend continuously over a period of not to exceed six (6) months in any calendar year, shall only be required to pay compensation and fees in a sum equal to one-half (½) of the compensation and fees herein provided, and, provided further, that the compensation and fees herein imposed shall not apply to motor vehicles maintained and used by a motor carrier as standby or emergency equipment. The board shall have the power and it is hereby made its duty to determine what motor vehicles shall be classed as standby or emergency equipment.

(b) When transportation service is rendered partly in this state and partly in an adjoining state or foreign

country, motor carriers shall comply with the provisions of this act relating to the payment of compensation and to the making of annual or special reports or statements herein required, and shall show the total business performed within the limits of this state and such other information concerning its operation within this state as may be required by the board as fully and completely and in the same manner as herein required of motor carriers operating wholly within this state.

(c) Upon the failure of any motor carrier to pay such compensation, when due, the board may in its discretion revoke the carrier's certificate or privilege and no carrier whose certificate or privilege is so revoked shall again be authorized to conduct such business until such compensation shall be paid.

(d) All compensation, fees, or charges, imposed and accruing under the provisions of this act, shall be a lien upon all property of the motor carrier used in its operations under this act; said lien shall attach at the time the compensation, fees, or charges become due and payable, and shall have the effect of an execution duly levied on such property of the motor carrier and shall so remain until said compensation, fees, or charges are paid or the property sold for the payment thereof.

History: En. Sec. 16, Ch. 184, L. 1931."

"'3847.17. *Motor carrier fund — composition — use.* All of the fees and compensation charges collected by the board under the provisions of this act shall be transmitted to the state treasurer who shall place the same to the credit of a special fund designated as 'motor carrier fun'; such fund shall be available for the purpose of defraying the expenses of administration of this act and the regulation of the businesses herein described, and shall be accumulative from year to year. All expenses of whatsoever kind or nature of the board incurred in carrying out the provisions of this act shall be audited by the state board of examiners and paid out of the 'motor carrier fund.' Such

fund shall not come within the restriction of any law of this state governing payment of expense incurred in a previous year, it being intended that such fund shall be applied to the payment of any necessary costs or expenses in carrying out the provisions of this act, whether incurred during the ensuing year or previous fiscal years, and such 'motor carrier fund' or accumulations thereof, are hereby appropriated for the payment of the costs and expenses rendered necessary in the carrying out of the provisions of this act.

History: En. Sec. 17, Ch. 184, L. 1931."

APPENDIX NO. 2

The Statute Imposing Tax of ½ of 1% on Gross Operating Revenue (Before Amendment)

NOTE: *The text quoted below is the text as it existed prior to amendment on February 19, 1947, after appeal in No. 39, October Term, 1947.*

(Originally enacted as Sections 27 and 28 of Chapter 100, Laws of Montana, 1935; now found as Sections 3847.27 and 3847.28 Revised Codes of Montana, 1935, at Pages 691 and 692 of Volume 2 (Political Code) Revised Codes of Montana, 1935.)

"3847.27. *Additional fees concerning motor carriers.* In addition to all other licenses, fees and taxes imposed upon motor vehicles in this state and in consideration of the use of the highways of this state, every motor carrier holding a certificate of public convenience and necessity issued by the public service commission, shall between the first and fifteenth days of January, April, July and October of each year, file with the public service commission a statement showing the gross operating revenue of such carrier for the preceding three months of operation, or portion thereof, and shall pay to the board a fee of one-half of one per cent of the amount of such gross operating revenue; provided,

however, that the minimum annual fee which shall be paid by each class A and class B carrier for each vehicle registered and/or operated under the provisions of the motor carrier act shall be thirty dollars ($30.00) and the minimum annual fee which shall be paid by each class C carrier for each vehicle registered and/or operated under the motor carrier act shall be fifteen dollars ($15.00)."

History: En. Sec. 2, Ch. 100, L. 1935.

"3847.28. *Disposition made of fees.* All fees collected from motor carriers shall be, by the commission, paid into the state treasury and shall be, by the state treasurer, placed to the credit of the motor carrier fund. All other fees and charges collected by the commission under the provisions of this act shall be by the commission paid into the state treasury and shall be by the state treasurer placed to the credit of a fund to be known as the 'public service commission fund,' and the general and contingent expenses of the public service commission shall be by the state treasurer paid out of said public service commission fund upon presentation of duly verified claims therefor, which claims shall have been approved by the commission and audited by the state board of examiners."

History: En. Sec. 3, Ch. 100, L. 1935.

APPENDIX NO. 3

THE STATUTE IMPOSING TAX OF ½ OF 1% ON GROSS OPERATING REVENUE (AFTER AMENDMENT)

Note: *The text quoted below is the text as it was amended by Chapter 73, Laws of Montana, 1947, approved February 19th, 1947, and made effective "from and after its passage and approval," some two months after the appeal herein was perfected on December 16th, 1946.*

(Enacted as Chapter 73, Laws of Montana, 1947, approved and effective on February 14, 1947, now found as an uncodi-

fied session law of the Thirtieth Legislative Assembly of Montana 1947, at pages 88-90, Laws of Montana, 1947).

CHAPTER 73

An Act to Amend Sections 3847.26 and 3847.27 of the Revised Codes of Montana, 1935, Relating to Fees and Charges to Be Made By the Board of Railroad Commissioners and the Public Service Commission of Montana; and Reports to Be Made by Certified Motor Carriers, and the Fees to Be Paid By Them in Connection With the Regulation of Such Carriers.

Be it enacted by the Legislative Assembly of the State of Montana:

Section 1. That Section 3847.26 of the Revised Codes of Montana, 1935, be and the same is hereby amended to read as follows:

"3847.26. *Fees Required for Filing Various Documents. The board of railroad commissioners and* the public service commission of Montana shall, except as otherwise provided by law, require and receive fees before filing any annual reports, tariffs, schedules and supplements thereof and shall require and receive fees for all copies of orders, documents, classifications, blank forms and other instruments prepared by it or on file in the office thereof, except as otherwise provided by law to be furnished free of charge, in accordance with the following:

Filing annual reports, each	$5.00
Filing tariffs, time schedules and supplements thereto, each	2.00
For issuing certificates of public convenience and necessity to motor carriers, each,	2.00
Classification for public utilities, each,	1.50
Classification for motor carriers, each,	.50
For copy of rules and regulations for motor carriers, each,	.25
Blank forms of annual reports for utilities and common carriers	Cost.

"Nothing herein contained shall be construed to require or authorize *the board of railroad commissioners or* the public service commission to collect fees for the filing of any annual reports, tariffs, schedules and supplements thereof which relate solely to interstate commerce."

Section 2. That Section 3847.27 of the Revised Codes of Montana, 1935, be and the same is hereby amended to read as follows:

"3847.27. *Additional Fees Covering Motor Carriers.* In addition to all other licenses, fees and taxes imposed upon motor vehicles in this state and in consideration of the use of the highways of this state, every motor carrier holding a certificate of public convenience and necessity *or permit* issued by the *board of railroad commissioners*, shall between the first and fifteenth days of January, April, July and October of each year, file with the *board of railroad commissioners* a statement showing the gross operating revenue of such carrier for the preceding three (3) months of operation, or portion thereof, and shall pay to the board a fee of one-half of one (1) per cent of the amount of such gross operating revenue; *and in the event that such carrier operates in interstate commerce, the gross operating revenue of such carrier within this state shall be deemed to be all the revenue received from business beginning and ending within this state, and a proportion based upon the proportion of the mileage within this state to the entire mileage over which the business is done of revenue on all business passing through, into or out of this state;* provided, however, that the minimum fee which shall be paid by each class A and class B carrier for each vehicle registered and/or operated under the provisions of the motor carrier act shall be thirty dollars ($30.00) and the minimum annual fee which shall be paid by each class C carrier for each vehicle registered and/or operated under the motor carrier act shall be fifteen dollars ($15.00)."

Section 3. All acts or parts of acts in conflict herewith are hereby repealed.

Section 4. This act shall be in full force and effect from and after its passage and approval.

Approved February 19, 1947.

APPENDIX NO. 4

Use of Tax Proceeds by Legislature

1933

Railroad and Public Service Commission

From the Revolving, or Motor Carrier Fund:

For salaries, for other operation, . . . "provided that any additional money remaining in this fund shall be used to pay that portion of operating expenses as set forth under the Railroad and Public Service Commission." (Sic).

House Bill No. 337, Laws of Montana, 1933, pp. 513, 515.

1935

Railroad and Public Service Commission

From the Motor Carrier Fund:

"All fees and collections for salaries and expenses as provided for in Chapter 184, Session Laws of 1931."

(Motor Carrier Act) House Bill No. 491, Laws of Montana, 1935, pp. 480, 484.

1937

Railroad and Public Service Commission

From the Motor Carrier Fund:

"All fees and collections for salaries and expenses as provided for in Section 3847.17 Revised Codes of Montana, 1935."

House Bill No. 246, Laws of Montana, 1937, p. 644, 648.

1939

Railroad and Public Service Commission

"In addition thereto, there is hereby appropriated all monies of the motor carrier fund and the gasoline inspection

fund as may be necessary in carrying out all the duties of the railroad and public service commission."

House Bill No. 410, Laws of Montana, 1939, pp. 661, 663.

1941

In this year, by Section 2 of Chapter 16, Laws of Montana, 1941, pp. 16-18, all moneys collected by the Board were paid to the State Treasurer for credit to the general fund of the State. Appropriations "for the purpose of carrying out all of the functions and duties of the railroad commission, the public service commission," etc., were made out of the general fund.

House Bill No. 106, Laws of Montana, 1941, pp. 366, 369, 370.

1943

In this year, appropriations were made out of the General Fund for salaries, operation, etc., of the "Railroad Commission" from the General Fund.

House Bill No. 95, Laws of Montana, 1943, pp. 516, 519, 520.

1945

The 1943 appropriation procedure was followed in 1945.

House Bill No. 108, Laws of Montana, 1945, pp. 555 and 559.

1947

And again in 1947.

House Bill No. 260, Laws of Montana, 1945, pp. 714, 717, 718.

Transfer of Motor Carrier Fund To State General Fund

Section 2 of Chapter 14, Laws of Montana 1941, pp. 16-21:

"Section 2. That all moneys collected or received by or paid over to the board of railroad commissioners of Montana, public service commission of Montana, state board of health, milk control board, state auditor and insurance commissioner ex-officio, under the pro-

visions of Section 2761, Revised Codes of Montana, 1935, department of agriculture, labor and industry, or any of the bureaus, divisions, officers or employees of any thereof, and to the state examiner and state forester, by way or on account of fees, licenses, or for any other purpose, on and after July 1, 1941, shall be paid over to the state treasurer who shall deposit the same to the credit of the general fund of the state."

Section 4 of Chapter 14, Laws of Montana, 1941, pp. 18-19:

"Section 4. Any and all balances remaining in any fund or funds established, created, kept or maintained in the state treasurer's office for any of the license or tax laws, specifically mentioned in Section 1 of this act, or for any of the departments, or bureaus, or divisions thereof, or for any of the officers specifically mentioned in Section 2 of this act, or for any of the institutions or departments thereof specifically mentioned in Section 3 of this act, at the close of the fiscal year ending July 1, 1941, shall be, by such state treasurer, immediately after the close of such fiscal year, transferred to and shall become a part of the state general fund, excepting moneys for school purposes which under existing law may not be apportioned or distributed until after July 1, 1941."

Section 10 of Chapter 14, Laws of Montana, 1941, pp. 20-21:

"Section 10. That Sections 2295.28, 2303.12, 2355.9, 2408.9, 2815.157, 3645, 10400.44, 10400.49 Revised Codes of Montana 1935, Section 29 Chapter 84, Section 7 of Chapter 91, Subsection 1 of Section 11 of Chapter 87, Section 9 of Chapter 94, Section 11 of Chapter 199 and Section 7 of Chapter 201 Session Laws of Montana 1937; and all other acts and parts of acts in conflict herewith are hereby repealed; it being the purpose and intent of this act that the licenses, fees, taxes and revenues specifically enumerated and described in Sections 1, 2 and 3 of this act shall be deposited by the state treasurer to the credit of the state general fund

and that no money shall be drawn from such fund but in pursuance of specific appropriations made by law, in conformity with the provisions of Section 10 of Article XII of the Constitution of the State of Montana."

Section 10 of Article XII of the Constitution of Montana provides:

"Sec. 10. All taxes levied for state purposes shall be paid into the state treasury, and no money shall be drawn from the treasury but in pursuance of specific appropriations made by law."

APPENDIX NO. 5

Additional Montana Taxes Paid by Interstate Motor Carriers

Registration and License PlateTax

Section 1759 R. M. C., 1935, as amended by Chapter 72, Laws of 1937, pp. 123-126, in current text:

Section 1. That Section 1759, Revised Codes, Montana, 1935, shall be, and the same is hereby amended to read as follows:

1759. *Application for Registration of Motor Vehicles and Payment of License Fees Thereon.* Every owner of a motor vehicle operated or driven upon the public highways of this state shall, for each motor vehicle owned, except as herein otherwise expressly provided, file, or cause to be filed, in the office of the county treasurer of the county wherein such motor vehicle is owned or taxable, an application for registration, or re-registration, upon blank form to be prepared and furnished by the registrar of motor vehicles, executed in duplicate, which application shall contain:

(1) Name and address of owner, giving county, school district, and town or city within whose corporate limits the motor vehicle is taxable.

(2) Name and address of conditional sales vendor, mortgagee or holder of other lien against said motor vehicle, with statement of amount owing under such contract or lien.

(3) Description of motor vehicle, including make, year model, engine and serial number, manufacturer's model or letter, weight, type of body and, if truck, the number of tons.

(4) In case of re-registration, the license number for the precedng year.

(5) Such other information as the registrar of motor vehicles may require.

Before filing such application with the county treasurer, the applicant shall submit the same to the county assessor of said county and said county assessor shall enter on said application in a space to be provided for that purpose, the full and true and the assessed valuation of said automobile for the year for which said application for registration is made.

The applicant shall, upon the filing of said application, (1) pay to the county treasurer the registration fee, as provided in Section 1760 Revised Codes of Montana, 1935, and shall also at such time (2) pay the taxes assessed against said motor vehicle for the current year of registration (unless the same shall have been theretofore paid for said year) before the application for registration or re-registration may be accepted by the county treasurer. The county treasurer is hereby empowered to make full and complete investigation of the tax status of said vehicle and any applicant for registration or re-registration must submit proof with respect thereto from the tax records of the proper county at the request of the county treasurer; provided, that nothing herein shall be deemed to conflict with the provisions of Section 1756.6 Revised Codes of Montana, 1935, and the provisions hereof shall be construed in connection therewith.

The amount of taxes on said motor vehicle shall be computed and determined by the county treasurer on the basis of the levy of the year preceding the current year of applica-

tion for registration or re-registration and such determination shall be entered on the application form in a space provided therefor.

Motor vehicles are hereby declared to be assessable for taxation as of and on the first day of January in each year irrespective of the time fixed by law for the assessment of other classes of personal property, and irrespective of whether or not the levy and tax may be a lien upon real property within the State of Montana, provided that in no event shall any motor vehicle be the subject of assessment, levy and taxation more than once in each year, *viz.*, the first day in January in each year, which shall be the time of assessment for tax purposes of motor vehicles in stock, in dealers' possession or in dead storage, as well as in use, subsequent registrations, if any, of the same vehicle in the same year not being subject to payment of taxes.

The applicant for original registration of any wholly new and unused motor vehicle acquired by original contract after the first day in January of any year, and such vehicle shall not be subject to assessment and taxation for said vehicle until the first day in January of the year next succeeding, but nothing herein contained shall exempt such vehicle from taxation in the possession of any person on said assessment date.

Upon accepting application for registration or re-registration of any motor vehicle which is subject to taxation in this state on January 1st in any year, and upon payment of taxes, the county treasurer shall stamp on said application: 'Taxes on this vehicle due January 1st of current year paid by applicant, prior applicant or owner and this vehicle is eligible for registration.'

Upon accepting application for registration of any motor vehicle which was not subject to taxation in this state on January 1st in any year, the county treasurer shall indicate such fact by proper entry on said application.

The registrar of motor vehicles shall have authority to make proper entry on any certificate of title to any motor vehicle respecting payment of taxes in accord with the fact.

Section 1759.3, R. C. M. 1935, as amended by Chapter 72, Laws 1937, Chapter 154 Laws of 1943, and in current text by Chapter 200, Laws of 1945, pp. 464-465:

Section 1. That Section 1759.3 of the Revised Codes of Montana for 1935, as amended by Chapter 72 of the Laws of the twenty-fifth legislative assembly of the State of Montana for 1937, and all other acts amendatory thereof be and the same is hereby amended to read as follows;

"Section 1759.3. *Disposition of Taxes and License Fees Collected and Method of Payment of Expenses of Costs of Making and Delivering License plates and Identification Marks, Certificates and All Other Expense of Operating the Motor Vehicle Department.* The county treasurer shall credit all taxes on motor vehicles so collected to a motor vehicle suspense fund and, at some time between March 1 and March 10 of each year, and every sixty (60) days thereafter, the county treasurer shall distribute the same in relative proportions required by the levies for state, county school district and municipal purposes in the same manner as other personal taxes are distributed. All motor vehicle license fees collected by the county treasurer for vehicle license fees collected by the county treasurer shall be credited to the motor vehicle license fund hereby established. The cost of making and delivering license plates and identification marks, certificates, and all other expense of operating the motor vehicle department of the State of Montana, shall be paid out of the motor vehicle recording fund (sometimes called the motor vehicle administrative fund); provided, however that each county shall receive its pro-rata share of any license fees, except dealer license fees, paid to the registrar of motor vehicles. The remainder in said county motor vehicle license fund shall be transferred by the county treasurer at the end of each month to the road fund of said county and shall be used by the county for the purpose set forth in Section 1760."

Section 1760, R. C. M. 1935, as amended by Chapter 154, Laws of 1943, and by Chapter 200, Laws of 1945, pp. 465-470,

in current text, omitting non-applicable schedules and other non-applicable matter:

"Section 1760. *Registration Fees of Motor Vehicles —Fees—Disposal of Proceeds—Fee for Half Year—Dealers' Registration and Transfer Thereof—Public Owned Vehicles Exempt From License or Registration Fees—License or Registration Fees for Trailers and Semi-trailers and Tractors, and Defining Same—Providing for Transfer of Funds From the Motor Vehicle Fund of the Registrar of Motor Vehicles to the Motor Vehicle Recording Fund (Sometimes Called the Motor Vehicle Administrative Fund)—Providing for Deposit of All Fees, Other Than License Fees, Except Dealer License Fees, Collected by the Registrar of Motor Vehicles, in Said Motor Vehicle Recording Fund for the payment of the Registrar of Motor Vehicles; Registration or License Fees Shall Be Paid Upon Registration or Re-registration of Motor Vehicles or Automobile Accessories in Accordance With This Act, as Follows:*

* * * * * * *

Motor vehicles, weighing twenty-eight hundred and fifty (2850) pounds, or under, other than motor trucks, five ($5.00) dollars;

Motor vehicles, weighing over twenty-eight hundred and fifty (2850) pounds, other than motor trucks, ten ($10.00) dollars;

* * * * * * *

Tractors and/or trucks of one (1) ton capacity or under, five ($5.00) dollars;

Tractors and/or trucks over one (1) ton and up to and including one and one-half (1½) tons capacity, ten ($10.00) dollars;

Tractors and/or trucks over one and one-half (1½) tons and up to and including two (2) tons capacity, twenty-two dollars and fifty cents ($22.50);

Tractors and/or trucks over two (2) tons and less than three (3) tons capacity, thirty-seven dollars and fifty cents ($37.50);

Tractors and/or trucks of three (3) tons and less than five (5) tons capacity, sixty ($60.00) dollars;

Tractors and/or trucks of five (5) tons capacity and over, two hundred ($200.00) dollars; provided that tractors shall not be construed as meaning farm tractors used on farms or tractors used solely in logging operations but only such tractors as are part of a unit to haul over the highways;

Busses shall be classed as motor trucks and licensed accordingly;

* * * * * * *

All rates to be twenty-five per cent (25%) higher for motor vehicles, trailers and semi-trailers, when not equipped with pneumatic tires;

* * * * * * *

All license or registration fees collected by the county treasurer of the county in which any motor vehicle is registered shall be credited to the motor vehicle license fund of said county. The funds in said county motor vehicle fund shall be used as follows:

(a) Fifty per cent (50%) of the net license fees derived from the registration of motor vehicles, the owners of which reside within the boundaries of any incorporated city of the State of Montana, having a population of thirty-five thousand (35,000) or more, according to federal census of 1930, *and twenty-five per cent (25%) of the net license fees derived from the registration of motor vehicles, the owners of which reside within the boundaries of any city in the State of Montana having a population of ten thousand (10,000), or more, according to the federal census of 1940, and which city is situated in a county which has an area of less than seven hundred and fifty square miles,* shall be held by county treasurer and segregated from other county road funds and be designated as 'city road fund,' to be used in city from which fees were derived for the construction of permanent streets within the incorporated limits of such city.

(b) The license fees held in the city road fund, as hereinabove provided, *at the end of each thirty (30) day period beginning March 1, 1945, be paid by the county treasurer to the city treasurer to be held by such city treasurer in a separate fund designated as the 'city road fund'*, shall be used by the city council of such city having the population of thirty-five thousand (35,000), or more, according to the federal census of 1930, *or by the city council of such city having a population of ten thousand (10,000), or more, according to the federal census of 1940 and situated in a county which has an area of less than seven hundred and fifty (750) square miles, only for the construction of permanent highways and streets within the boundaries of such incorporated city.* Provided, that all construction of public highways and streets, the cost of which is to be paid out of the fund derived from the license fees as herein provided, shall be under the supervision of the county surveyor of the county within whose boundaries such city is situated, subject to the control of the said city council and surveyor to designate the public highway or street upon which the work is to be done and the type of pavement to be used, and provided further, that the cost of supervision of the county surveyor shall not exceed five percent (5%) of the cost of said work.

(c) The net license fees derived from the registration of motor vehicles shall be by the registrar of motor vehicles transmitted to, and paid over to the county treasurer of the county from which the registration fee came, such fees excepting apportionment to city road fund, to be used by said county for the construction, repair and maintenance of all public highways, except state and federal highways, within the boundaries of said county, including streets forming component parts of arterial highways within the corporate cities of less population than thirty-five thousand (35,000), according to the federal census of 1930, *other than any corporate city entitled to receive or expend the 'city road fund', within the boundaries of said county,*

All fees, other than license fees, mentioned and described in Section 1758.3 and 1758.4, both as amended by Chapter 72 of the Laws of the twenty-fifth legislative assembly of the State of Montana for 1937, and all other acts amendatory to either of such sections, and in Section 1763.3 of the Revised Codes of Montana for 1935, shall hereafter be deposited in, and paid into, the motor vehicle recording fund of said registrar (sometimes called the motor vehicle administrative fund), out of which shall be paid all salaries, operating expenses, and all other expenses of the department of the registrar of motor vehicles.

There shall be immediately transferred from the motor vehicle fund of the registrar of motor vehicles to the said motor vehicle recording fund all moneys now in said motor vehicle fund which were collected by the registrar of motor vehicles as fees other than license fees.

Whenever, in the judgment of the state board of examiners, there shall be in said motor vehicle recording fund more moneys than are reasonably required or needed to pay all salaries, operating expenses, and all other expenses of the department of the registrar of motor vehicles, such board shall distribute such unneeded surplus or excess to the fifty-six (56) counties of the state in a pro-rata manner based upon the total number of motor vehicles registered in each county."

And see the companion measure, Chapter 201, Laws of 1945, pp. 470-476.

Gasoline License Tax

The Gasoline License Tax of five cents per gallon is an occupation tax imposed on distributors of gasoline by Section 2381.10, R.C.M. 1935, originally enacted as Section 9, Chapter 95, Laws of 1931, and continued in force by successive legislative enactments through Chapter 39, Laws of Montana, approved by the people as Referendum Measure No. 49, 1945, pp. 74 to 86, currently in force. The proceeds of the tax have, since at least 1931, been continuously

pledged to the payment of debentures issued under State Highway Treasury Anticipation Debenture Acts for construction and improvement of state highways under the Federal Aid Highways System.

State ex rel Diederichs v. *State Highway Commission*, 89 Mont. 205, 296 Pac. 1033;

Arps v. *State Highway Commission*, 90 Mont. 152, 300 Pac. 549;

Martin v. *State Highway Commission*, 107 Mont. 603, 88 Pac. (2nd) 41;

Pioneer Motors v. *State Highway Commission* — Mont. —, 165 Pac. (2nd) 796.

In reality, the tax is paid by the purchaser at the time he buys gasoline for his car or truck from a vendor's pump or tank in Montana, the purchase price including the tax. The tax is collected by the State Board of Equalization under the provisions of Section 2381.10, R.C.M. 1935, and Section 10 of Chapter 39, Laws of Montana, 1945. The proceeds are disposed of in accordance with law, as follows:

Section 2381.22, R.C.M. 1935:

"2381.22. *Distribution of proceeds of tax—funds.* All money received by the state treasurer in payment of license taxes under the provisions of this act shall be deposited and credited (a) seventy-five per centum (75%) to the state highway fund, and (b) twenty-five per centum (25%) to a special fund designated as 'gasoline license drawback fund.'

All money so collected and deposited in the gasoline license tax drawback fund shall be used for the purpose of making such refunds and paying such drawbacks as are authorized by law to be made or paid to purchasers of gasoline used in this state for other purposes than the propulsion of motor vehicles over the public highways and streets of this state, provided, however, that at the close of each fiscal year, the state treasurer shall transfer all money remaining unexpended in said gasoline license tax drawback fund to the state highway fund; provided, further, that if at any time the money in said gasoline license tax drawback

fund is insufficient in amount to pay duly authorized and approved refunds or drawbacks, the state treasurer shall transfer from the state highway fund a sum or sums sufficient in amount to meet and pay all such outstanding authorized and duly approved refunds or drawbacks;

All moneys so collected and deposited or transferred to said state highway fund shall be used and expended by the state highway commission in the construction, reconstruction, betterment, maintenance, administration and engineering on the federal highway system of highways in this state selected and designated under the provisions of the federal aid act, approved July 11, 1916, and the federal highway act, approved November 9, 1921, and all amendments thereto, and for the purpose of construction, reconstruction, betterment, maintenance, administration and engineering of highways leading from each county seat in the state to said federal highway system of federal aid roads where such county seat is not on said system, and for the purpose of construction, reconstruction, betterment, maintenance, administration and engineering of such other roads as have been or may be authorized by the laws of Montana, for the collection and enforcement of this act; provided, that the total cost to the state of administration and engineering on the federal aid work contemplated by this act shall not exceed for any fiscal year eight per centum (8%) of the total of state, federal aid and other available funds expended under the supervision of the state highway commission."

Sections 9 and 10 of Chapter 39, Laws of 1945, pp. 84 and 85, provide as follows:

"Section 9. The license tax of five (5¢) cents a gallon of gasoline on dealers or distributors, provided for in initiative measure No. 41 as amended by chapter 30 of the laws of the twenty-sixth legislative assembly of the State of Montana of 1939, and all gallonage taxes on dealers and distributors of gasoline imposed by prior laws, shall be repealed on the date on which

the state treasurer shall have placed in the state highway treasury anticipation debenture interest and redemption fund of 1938 moneys which, when added to the balance in said fund, shall be sufficient to redeem all outstanding state highway treasury anticipation debentures issued under the authority of initiative measure No. 41, as amended by chapter 30 of the laws of the twenty-sixth legislative assembly of the State of Montana for the year 1939.

Section 10. For the purpose of providing funds for the payment of the interest upon and maturing principal of the state highway treasury anticipation debentures herein provided for, every dealer as referred to and defined in the gasoline license tax laws of the State of Montana now in effect, from and after the time when the repeal of the tax provided in initiative measure No. 41 as amended shall become effective as hereinabove provided, until the principal and interest of all debentures issued under the authority of this act shall have been paid, shall pay to the state board of equalization, for deposit in the state treasury, a license tax for the privilege of engaging in and carrying on such business in this state, in an amount equal to five (5¢) cents for each gallon of gasoline (as defined in Section 2381.11 Revised Codes of Montana 1935), refined, manufactured, produced or impounded by such dealer, and distributed, used or sold by him in this state, or shipped, transported or imported by such dealer into and distributed, used or sold by him within this state, after it has arrived in and is brought to rest within this state, whether sold in the original packages or in broken packages; provided that all gasoline delivered by any dealer to any of his own service stations in this state shall be deemed to have been sold, and shall be treated and considered as sold, in computing such license tax, in the same manner as though the same had been sold to other persons. In making the computation of license tax due and in making payment thereof, two per cent (2%) of the amount of such tax shall be deducted by the

dealer as an allowance for evaporation and other loss of gasoline handled by such dealer. No gasoline used or sold by such dealer, which was purchased by him from a dealer who has paid the tax thereon, shall be included or considered in determining the amount of such license tax to be paid by such dealer, and no gasoline exported by such dealer out of the State of Montana shall be included in the computation of any dealer's license tax herein provided for."

Section 2396.2, R.C.M. 1935, as amended by Section 1, Chapter 264, Laws of Montana, 1947, p. 504:

"Section 2396.2. *Use of State Highway Fund on Federal Highway System.* All moneys of the state highway fund, including moneys arising from the license tax upon dealers in gasoline and motor fuels, but excluding moneys being held in such fund for refund or drawback purposes and expense of collection and enforcement; shall be used and expended by the state highway commission in the construction, reconstruction, betterment, maintenance, administration and engineering on the federal highway system of highways in this state selected and designated under the provisions of the federal aid act, approved July 11, 1916, and the federal highway act approved November 9, 1921, and all amendments thereto, and for the purpose of construction, reconstruction, betterment, maintenance, administration and engineering of highways leading from each county seat in the state to said federal highway system of federal aid roads where such county seat is not on said system, and for the purpose of construction, reconstruction, betterment, maintenance, administration of such other roads as have been or may be authorized by the laws of Montana. Provided, that the total net costs to the state for administration on the federal aid work contemplated by this act shall not exceed for any fiscal year eight per cent (8%) of the total of state, federal aid and other available funds expended under the supervision of the state highway commission. It shall be the duty of the state highway

commission, in expending such money, to carry forward construction from year to year, using the money expended through the matching up of federal aid allotments to Montana upon the said federal highway system of highways in the various parts of the state in proportion to the amount of mileage still to be constructed in the various sections of that system as defined in Section 2396.1; provided that nothing in this act shall be construed to conflict with said federal aid highway acts and the rules by which they are administered. *The state highway commission is authorized to enter into co-operative agreements with the national park service and the public roads administration for the purpose of maintaining national park approach roads in Montana.*"

The state highway fund referred to in the foregoing sections is established by Section 1799, R.C.M. 1935, in text as follows:

"*1799. State highway fund and trust fund.* For the purpose of carrying out the provisions of this act, there is hereby created a state highway fund and a state highway trust fund. The state highway fund shall be credited with all moneys received for the use and purpose of the state highway commission from the receipt or transfer of motor vehicle license fees, as provided by law, or from other sources except as herein provided. The state highway trust fund shall be credited with all moneys received from the counties, and from the federal government or other agencies for expenditure by the commission in connection with the actual construction of specific projects. All moneys in the hands of any state officer on the first day of April, 1921, shall be segregated by such state officer and credited to the respective fund to which it properly belongs as above defined. Hereafter all moneys collected for the state highway fund or the state highway trust fund as authorized by law shall be credited to such fund or funds by the state treasurer; provided, however, that nothing herein contained shall prevent

the state highway commission from recovering from the state highway trust fund moneys deposited or paid into such trust fund by counties and the federal government or other agencies, to defray the cost of engineering incident to the construction, supervision and inspection of projects carried on under the direction of the commission."

Montana's Assent to Federal Aid Road Act, Section 1791, R.C.M. 1935:

"*1791. Assent to federal aid road act.* For and on behalf of the state of Montana, and in conformity with the requirement of section 1 of said act, the provisions of that certain act of congress approved July 11, 1916, known as the federal aid road act and entitled "An Act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes," is hereby assented to. The state highway commission is hereby authorized to, for and on behalf of the state of Montana, enter into all contracts and agreements with the United States government or any officer, department or bureau thereof, relative to the construction or maintenance of highways in the state of Montana; and the state highway commission for and on behalf of the state of Montana is hereby authorized to do all other things necessary or required to carry out fully the co-operation contemplated by the said act of congress as hereby assented to, relative to the construction and maintenance of roads and highways in the state of Montana."